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## The Case for Abolishing Centralized White House Regulatory Review

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# THE CASE FOR ABOLISHING CENTRALIZED WHITE HOUSE REGULATORY REVIEW

*Rena Steinzor\**

*A series of catastrophic regulatory failures have focused attention on the weakened condition of regulatory agencies assigned to protect public health, worker and consumer safety, and the environment. The destructive convergence of funding shortfalls, political attacks, and outmoded legal authority have set the stage for ineffective enforcement, unsupervised industry self-regulation, and a slew of devastating and preventable catastrophes. From the Deepwater Horizon spill in the Gulf of Mexico to the worst mining disaster in forty years at the Big Branch mine in West Virginia, the signs of regulatory dysfunction abound. Many stakeholders expected that President Barack Obama would recognize and ameliorate this unacceptable state of affairs, but his administration has largely ignored it, instead accepting Republican claims that over-regulation is the overriding problem du jour.*

*One central reason for the systemic failure of effective health and safety regulation is the fact that many regulatory matters enter and exit the White House through the Office of Management and Budget's (OMB) little-known but extraordinarily powerful Office of Information and Regulatory Affairs (OIRA). Centralized White House regulatory review began in the Nixon administration and OIRA was created in 1980. Over four decades, the process has evolved into a relentless gauntlet for public health, worker safety, and environmental protection initiatives, subjecting the agencies' efforts to implement their demanding statutory mandates to withering rule-by-rule review. Analogous to examining the roots of individual trees without realizing that they are part of a dying forest, this myopia has obscured the causes and effects of regulatory failure for five presidents from both parties.*

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\* Professor, University of Maryland School of Law, and President, Center for Progressive Reform (CPR), <http://www.progressivereform.org>. CPR is a think tank composed of fifty-three academics from universities across the country specializing in health, safety, and environmental policymaking. I am grateful to Robert Glicksman, Lisa Heinzerling, Noah Sachs, Sidney Shapiro, Amy Sinden, Wendy Wagner, and, especially, Holly Doremus for wonderful comments on this Article, and James Goodwin, CPR's OIRA expert, for keeping me well informed. Thanks also to Jim Tozzi and Don Arbuckle: our views on OIRA are 180-degrees apart, but they were patient and thoughtful in responding to ideas they dislike. Michael Patoka, a third-year student at Maryland, was my partner in analyzing the Environmental Protection Agency's (EPA) coal ash regulations and much of the analysis of the rule explained here is based on his terrific work. I thank Summer Niazy and Andrew Goldman for excellent research assistance, and, last but not least, research fellow Alice Johnson for invaluable editing help.

*This Article proposes that the President terminate centralized White House regulatory review of individual rules and abolish OIRA's role in regulatory affairs. The President can exert sufficient control over rulemaking through the political appointees he has selected to lead the agencies, and they can work on cross-cutting issues affecting more than one agency within the framework of the Domestic Policy Council.*

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## INTRODUCTION

Catastrophic regulatory failures dominate the headlines with a frequency that is unprecedented. Tragedies as diverse as the *Deepwater Horizon* spill in the Gulf of Mexico, the Big Branch mine disaster, one billion gallons of overflowing coal ash sludge in Tennessee, the deadly Texas City and Tesoro refinery explosions, tainted food and drugs, and increasingly dangerous consumer product imports can all be traced to corporate scofflaws repeatedly allowed to run amok by beleaguered regulatory agencies suffering from acute dysfunction.<sup>1</sup>

Although everyone should be able to agree that these events are intolerable, thoughtful analysis is sidetracked by the nation's polarized debate over the role of government. Conservative commentators argue that accidents like the Gulf spill are the inevitable byproducts of industrialization, having little to do with government failure.<sup>2</sup> They say that overregulation is a far more serious problem than underregulation because excessive rules hobble the country's long-delayed recovery from a devastating worldwide recession.<sup>3</sup> Progressive commentators respond that these events reflect the demise of a regulatory state that was weakened to the point of dysfunction during the presidency of George W. Bush and never given an opportunity to recover.<sup>4</sup> One of the government's most important jobs is to compel

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1. See, e.g., Cary Coglianese et al., *Consumer Protection in an Era of Globalization, in* IMPORT SAFETY: REGULATORY GOVERNANCE IN THE GLOBAL ECONOMY 3, 3–21 (Cary Coglianese et al. eds., 2009) [hereinafter IMPORT SAFETY] (describing the American recall of millions of Chinese-manufactured toys covered in lead paint); Ian Urbina, *No Survivors Found After West Virginia Mine Disaster*, N.Y. TIMES, Apr. 10, 2010, at A1; Leslie Wayne, *The Enemy at Home*, N.Y. TIMES, Oct. 8, 2009, at B1 (reporting on noxious and corrosive sulfur-infused drywall imported from China); Aaron Clark et al., *Tesoro Refinery Blast Kills 5, May Be Worst Since '05 (Update2)*, BLOOMBERG (Apr. 3, 2010, 12:49 EDT), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFn6ib6Jhg6w&pos=8>; Jared A. Favole & Alicia Mundy, *FDA Cites Two Chinese Heparin Makers*, WALL ST. J. (Apr. 18, 2009, 5:51 AM), <http://online.wsj.com/article/SB123999583350129829.html>; Ryan Knutson, *Blast at BP Texas Refinery in '05 Foreshadowed Gulf Disaster*, PROPUBLICA (July 27, 2010, 10:30 PM), <http://www.propublica.org/article/blast-at-bp-texas-refinery-in-05-foreshadowed-gulf-disaster>.

2. See, e.g., David Brooks, Op-Ed., *Drilling for Certainty*, N.Y. TIMES, May 28, 2010, at A23.

3. See, e.g., *Issa Makes Submissions Reflecting Input from Job Creators on Regulatory Barriers to Job Creation Public*, COMM. ON OVERSIGHT & GOV'T REFORM, [http://oversight.house.gov/index.php?option=com\\_content&task=view&id=1115&Itemid=29](http://oversight.house.gov/index.php?option=com_content&task=view&id=1115&Itemid=29) (last visited Feb. 21, 2011) (results of an initiative by Representative Darrell Issa to identify regulations to target). Representative Issa wrote approximately 160 trade associations representing large, medium, and small businesses, and solicited their "assistance in identifying existing and proposed regulations that have negatively impacted job growth in [their] members' industry." See *Issa's Letter to Business Groups*, NBC NEWS (Jan. 4, 2011, 11:28 EST), [http://firstread.msnbc.msn.com/\\_news/2011/01/04/5763871-issas-letter-to-business-groups](http://firstread.msnbc.msn.com/_news/2011/01/04/5763871-issas-letter-to-business-groups).

4. See, e.g., SIDNEY SHAPIRO ET AL., CTR. FOR PROGRESSIVE REFORM, REGULATORY DYSFUNCTION: HOW INSUFFICIENT RESOURCES, OUTDATED LAWS, AND POLITICAL

industry to implement redundant, fail-safe mechanisms to protect public health and the environment. Spills, explosions, tainted food, dangerous products, and unhealthy air pollution represent chronic failures by government to prevent conduct that unfortunately lies in the mainstream of business as usual.

During his presidential campaign, Barack Obama repeatedly declared that the role of government is to help people when they cannot help themselves,<sup>5</sup> raising the strong expectation that he would sponsor affirmative reform to prevent the damage produced by the sharper edges of a capitalist economy. This explanation—advocating forceful intervention in situations where well-organized special interests cause irrevocable harm that individual citizens cannot deter—evocatively promised that, if elected, candidate Obama would adopt fundamentally different policies than his predecessors. The President’s health care initiative and his push to reform financial markets reinforced the impression that active intervention to strengthen government would be his administration’s prevailing mode.<sup>6</sup>

But despite his selection of experienced and well-respected appointees to lead the eight protector agencies created to protect public health, worker safety, and the environment<sup>7</sup>—most notably, Lisa Jackson at the

INTERFERENCE CRIPPLE THE “PROTECTOR AGENCIES” (2009), available at [http://www.progressivereform.org/articles/RegDysfunction\\_906.pdf](http://www.progressivereform.org/articles/RegDysfunction_906.pdf).

5. See, e.g., Barack Obama, Closing Argument Speech at the Canton Memorial Civic Center (Oct. 27, 2008) (transcript available at [http://blogs.suntimes.com/sweet/2008/10/obama\\_closing\\_argument\\_speech\\_1.html](http://blogs.suntimes.com/sweet/2008/10/obama_closing_argument_speech_1.html)).

6. See, e.g., Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, with a Flourish*, N.Y. TIMES, Mar. 24, 2010, at A19; Edward Wyatt, *Veto Threat Raised Over Derivatives*, N.Y. TIMES, Apr. 17, 2010, at B1.

7. The eight agencies include, in the order of the approximate sizes of their workforce: the Environmental Protection Agency (EPA); the Food and Drug Administration (FDA); the Nuclear Regulatory Commission (NRC); the Mine Safety and Health Administration (MSHA); the Occupational Safety and Health Administration (OSHA); the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE); the National Highway Traffic and Safety Administration (NHTSA); and the Consumer Product Safety Commission (CPSC). EPA’s enacted FY 2009 budget totaled approximately \$7.6 billion and 17,252 “full-time equivalent” (FTE) staff positions. See EPA, FY 2010 BUDGET IN BRIEF 7 (2009), available at <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P10093CX.txt>. FDA’s enacted FY 2009 budget totaled approximately \$2 billion and 8,524 FTEs. FDA, FY 2011 PRESIDENT’S BUDGET REQUEST ALL PURPOSE TABLE—BUDGET AUTHORITY, <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/BudgetReports/UCM202313.pdf> (last visited Aug. 25, 2011). NRC’s enacted FY 2009 budget totaled approximately \$1 billion and 3,848 FTEs. NRC, 2009–2010 INFORMATION DIGEST 12–13 (2009), available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1350/v21/sr1350v21.pdf>. MSHA’s enacted FY 2009 budget totaled approximately \$347 million and 2,361 FTEs. U.S. DEP’T OF LABOR, FY 2011 CONGRESSIONAL BUDGET JUSTIFICATION: MINE SAFETY AND HEALTH ADMINISTRATION 4, <http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V2-12.pdf> (last visited Aug. 25, 2011). OSHA’s enacted FY

Environmental Protection Agency (EPA), Margaret Hamburg at the Food and Drug Administration (FDA), and David Michaels at the Occupational Safety and Health Administration (OSHA)—President Obama did not make lasting commitments to substantially increase their budgets, support them when they ran into political trouble, or update the outmoded laws that undermine their efforts to police corporate misconduct.<sup>8</sup>

In the aftermath of the 2010 midterm elections, with conservatives firmly in charge of the House of Representatives and already mounting an attack on regulations that allegedly cripple the economy, President Obama pivoted from neglect to repudiation, publishing an opinion piece in the *Wall Street Journal* promising to create a “21st-century” system that eliminates

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2009 budget totaled approximately \$513 million and 2,147 FTEs. U.S. DEP’T OF LABOR, FY 2011 CONGRESSIONAL BUDGET JUSTIFICATION: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 4, <http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V2-11.pdf> (last visited Aug. 25, 2011). In 2011, BOEMRE had 1,172 FTEs. BOEMRE, CONTINGENCY PLAN IN THE EVENT OF FEDERAL GOVERNMENT SHUTDOWN 2, <http://www.doi.gov/shutdown/loader.cfm?csModule=security/getfile&PageID=240494> (last visited Aug. 25, 2011). NHTSA’s enacted FY 2009 budget totaled approximately \$935 million and 607 FTEs. NHTSA, U.S. DEP’T OF TRANSP., BUDGET ESTIMATES: FISCAL YEAR 2010, 12, 14, <http://www.dot.gov/budget/2010/budgetestimates/nhtsa.pdf> (last visited Aug. 25, 2011). CPSC does not report enacted budget levels. In FY 2009, it reported an appropriation totaling approximately \$105 million and 483 FTEs. CPSC, 2010 PERFORMANCE BUDGET REQUEST, at vi (2009), <http://www.cpsc.gov/cpsc/pub/pubs/reports/2010plan.pdf> (last visited Aug. 25, 2011). Apparent discrepancies between the size of an agency’s budget appropriations and its full-time staff are explained by the fact that they commit significant amounts of their budgets on state grants. The total staff for all eight agencies was 36,433.

8. Modest increases in some agency budgets were proposed but were quickly eclipsed by deficit politics, with the President hastening to make deals with Republicans and paving the way for deep cuts in the funding available to implement those protections. *See, e.g.*, Jim Efstathiou, *EPA Budget Cut Will Restrict Enforcement of Clean-Air Rules, Activists Say*, BLOOMBERG (April 12, 2011, 4:35 PM), <http://www.bloomberg.com/news/2011-04-12/epa-budget-cut-will-restrict-enforcement-of-clean-air-rules-activists-say.html>; Laura Walther, *FY 2012 Budget Request Includes \$583 Million for OSHA*, EHS TODAY (Feb. 15, 2011, 11:43 AM), <http://ehstoday.com/standards/osha/budget-request-includes-millions-osha-0215/>. The President has not defended the mission of the agencies or the performance of the people he appointed to lead them in the face of blistering Republican attacks on over-regulation, except in the context of explaining how far he is willing to go to eliminate unnecessarily burdensome regulations. *See, e.g.*, Alan Fram, *Obama’s Push to Revamp Regulations*, WASH. POST, May 30, 2011, at A21 (“Overall, the drive would save hundreds of millions of dollars annually for companies, governments and individuals and eliminate millions of hours of paperwork while maintaining health and safety protections for Americans, White House officials said.”). The President was missing in action during congressional debate regarding legislation to strengthen regulation of deepwater oil production and mine safety. This approach was emblematic of the administration’s reluctance to put much political capital on the line in the health, safety, and environmental arena. *See, e.g.*, Vicki Smith, *MSHA to Congress: Mine Safety Laws Need to Be Stronger*, HUFFINGTON POST (Mar. 3, 2011, 12:41 PM), [http://www.huffingtonpost.com/2011/03/03/msha-congress-mine-safety\\_n\\_830841.html](http://www.huffingtonpost.com/2011/03/03/msha-congress-mine-safety_n_830841.html) (“MSHA chief Joe Main . . . told the chairman, Republican Rep. Tim Walberg of Michigan, he was not recommending any particular legislation.”).

“dumb” rules and avoids “excessive, inconsistent, and redundant regulation.”<sup>9</sup> His State of the Union Address a few days later supported a five-year freeze on domestic spending, ensuring that his administration will be hard pressed to address the woefully inadequate funding that cripples agencies assigned to protect public health, ensure worker and consumer safety, and safeguard the environment.<sup>10</sup> All hope of affirmative law reform disappeared until at least after the 2012 presidential election.

The President’s pivot was foreshadowed by his appointment of former Harvard law professor Cass Sunstein as his “regulatory czar,” a position formally known as the administrator of the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA). No regulation that would impose more than \$100 million annually in projected costs can go into effect without running the gauntlet at OIRA. Sunstein, who has strong views on curtailing the economic impact on business of health, safety, and environmental laws,<sup>11</sup> has continued the tradition of OIRA serving as a one-way ratchet for weakening protective rules.<sup>12</sup>

This Article argues that centralized White House regulatory review is a primary cause of regulatory failure that the nation can well do without. Centralized review shoves policymaking behind closed doors, wastes increasingly limited government resources, confuses agency priorities, demoralizes civil servants, and, worst of all, costs the nation dearly in lost

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9. Barack Obama, Op-Ed., *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, at A17; see also Cass Sunstein, Op-Ed., *21st-Century Regulation: An Update on the President’s Reforms*, WALL ST. J., May 26, 2011, at A17.

10. President Barack Obama, State of the Union Address (Jan. 25, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>).

11. See, e.g., CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005). Sunstein’s book, *Laws of Fear*, is an attack on the precautionary principle, which Sunstein describes as “literally incoherent” in “its strongest forms.” *Id.* at 4. He explains that the strong form of this principle requires regulation “whenever there is a possible risk to health, safety, or the environment, even if the supporting evidence remains speculative and even if the economic costs of regulation are high.” *Id.* at 24. He contends that powerful and irrational social forces feed average citizens’ overreaction to risk. Because non-experts have difficulty factoring in the probability that a risk would occur and instead panic in response to harm that has a very small chance of occurring, “the public’s demand for government intervention can be greatly affected by probability neglect, so that regulators may end up engaging in extensive regulation precisely because intense emotional reactions are making people relatively insensitive to the (low) probability that dangers will ever come to fruition.” *Id.* at 69. Sunstein sees these reactions as so extreme that he recommends keeping the public from influencing government decisions that involve such risks: “[T]here is [a risk that] high levels of public participation in technical domains [will] simply heighten public fear, with unfortunate consequences for policy.” Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1161 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)).

12. See *infra* notes 230–303 and accompanying text.

lives, avoidable illness and injury, and destruction of irreplaceable natural resources. The Obama administration's continuation of centralized review is a critical reason why his potentially transformative presidency has ignored the urgency of reviving health, safety, and environmental agencies. At the rate events are unfolding, this mistake could define his historical legacy in the most negative of terms, as it has already defined the legacy of his predecessor, George W. Bush. Instead of perpetuating centralized review, the President should recognize that final authority to formulate individual regulation belongs with the political appointees who lead the agencies, with the President retaining the authority to hire and fire those high-level officials if they do not do their jobs to his satisfaction.

Proponents of centralized review include some heavy hitters from the legal academy, including Supreme Court Justice Elena Kagan; former Department of Justice attorney John Yoo, who was a central architect of President George W. Bush's strategy for invoking executive powers; and former Harvard professor Cass Sunstein.<sup>13</sup> Other distinguished administrative law and policy scholars similarly defend presidential prerogatives,<sup>14</sup> although a strong minority warns of its shortcomings.<sup>15</sup> Most accept as

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13. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (defending unitary executive theory, although not on constitutional grounds); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435 (1999).

14. See, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 879–82 (2003) (arguing that White House influence over the process should be viewed as a welcome development); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080–88 (1986) (defending the Reagan process of regulatory review as a necessary and appropriate exercise of presidential power); John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953 (2006) (explaining how centralized review creates cost-effective rules); Robert Hahn & Robert E. Litan, *Why Congress Should Increase Funding for OMB Review of Regulations*, BROOKINGS (Oct. 2003), [http://www.brookings.edu/opinions/2003/10\\_ombregulation\\_litan.aspx](http://www.brookings.edu/opinions/2003/10_ombregulation_litan.aspx) (extolling the virtues of a robust economic analysis of rules prompted by OIRA oversight).

15. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (refuting the assumptions that agencies are captured by stakeholders and that OIRA is immune from such pressures); Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 J. CONST. L. 357 (2010) (contending that the President is poorly equipped to make the expert judgments that Congress delegated directly to the regulatory agencies); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 108 COLUM. L. REV. 263 (2006) (arguing that an express delegation of authority to an agency administrator diminishes the President's power to undertake centralized regulatory review that requires substantive changes in rule proposals); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (decrying the intrusiveness of White House politicization of the administrative process).



dogma that the President must exert rigorous, day-to-day control over regulatory policy making.<sup>16</sup> They further argue that cost-benefit analysis must reign supreme in regulatory decision making and that OIRA must enforce that discipline.<sup>17</sup> In contrast, I contend that OIRA, with all the flaws inherent in its mission and institutional design, occupies such a central role in the President's universe that it blinds the White House to the existence of agency dysfunction and regulatory failure and prevents a concerted, desperately needed response to that far more significant phenomenon. To avoid confusing this crucial point, the following discussion shoves to one side the question of whether the defective methodology of cost-benefit analysis should continue to preoccupy regulatory agencies.<sup>18</sup>

Part I makes the case that under-regulation is an important and urgent crisis confronting the nation and discusses the root causes of this condition. Part II reviews the history of centralized review. From its antecedent as an informal process that gave business executives and sympathetic political aides a major voice in regulatory policy during the Nixon, Ford, and Carter administrations, to its modern role as the headquarters of withering economic analysis of highly speculative regulatory costs, OIRA has fostered deep suspicion of health, safety, and environmental agencies among White House staff. This suspicion slowed the agencies' momentum in their heyday and has accelerated their decline. Part III examines the consequences of these trends, concluding that they not only forestall badly needed affirmative regulation, but squander opportunities to solve problems before they become intractable.

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16. See, e.g., DeMuth & Ginsburg, *supra* note 14; Graham et al., *supra* note 14; Hahn & Litan, *supra* note 14.

17. See, e.g., DeMuth & Ginsburg, *supra* note 14; Graham et al., *supra* note 14; Hahn & Litan, *supra* note 14.

18. Cost-benefit analysis, which seems firmly entrenched, is justly criticized on factual, legal, methodological, and ethical grounds, and I am no fan of it. But OIRA does not write such analyses for individual rules; rather, those tasks are handled by robust groups of economists working within the agencies. A proposal to abandon OIRA's role in reviewing individual rules does not prevent the President from continuing to require that cost-benefit analyses be conducted. For a discussion of the problems with the methodology, see FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991); Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345 (2003).

## I. REGULATORY FAILURE

### *A. Dysfunction and Failure Defined*

My working definition of agency dysfunction is a condition characterized by the emergence of chronic, severe, and distinct patterns of incapacity to fulfill statutory missions, as opposed to circumstances where an agency program is ineffective a handful of times. Weakness in one or two programs does not rise to the level of dysfunction, especially if an agency takes remedial action to resolve these problems before they threaten its credibility. When a pattern of poor performance remains unaddressed, gradually developing into chronic weakness in standard setting and enforcement that threatens workers, consumers, and breathers generally,<sup>19</sup> as well as a regulated industry as a whole,<sup>20</sup> an agency is on the cusp of dysfunction. A dysfunctional agency presiding over a cluster of hazardous industrial practices creates conditions ripe for regulatory failure. So, for example, when a set of circumstances emerges that could cause death, injury, and damage to the environment, and the agency assigned to prevent these conditions is so dysfunctional that it lacks the capacity to avert the threat, regulatory failure is imminent. The *Deepwater Horizon* spill was preceded by weak or non-existent safety rules and infrequent, ineffective inspections. The Big Branch mine disaster was preceded by chronic violations of safety standards and enforcement so anemic that the corporate operator had no incentive to prevent the accident.<sup>21</sup> This Article addresses instances of severe regulatory failure that have occurred, as well as those that are imminent.

Conservative deregulators implicitly justify dysfunction by ignoring the detailed statutory mandates Congress assigned to the agencies. This ultra-pragmatic, extra-legal approach, articulated in its most extreme form by activist Grover Norquist when he announced his goal as getting government “down to the size where we can drown it in the bath tub,”<sup>22</sup> also weakens the nation’s political fabric. Rendering statutory provisions

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19. “Breathers” is used to connote citizens who, in their lives apart from work, are exposed to environmental pollution of the air, water, and soil. “Consumers” are the same people, but those who are exposed to hazards as a result of purchasing products, drugs, or food.

20. For example, the peanut industry lost an estimated \$1 billion as a result of the 2008 Peanut Corporation of America salmonella recall. *See, e.g.*, Christopher Doering, *Salmonella Recall is No Small Peanuts*, REUTERS (Mar. 11, 2009, 2:57 PM), <http://www.reuters.com/article/2009/03/11/us-salmonella-peanuts-smallbusiness-idUSTRE52A61T20090311>.

21. *See, e.g.*, Steven Mufson et al., *Mine Cited for Litany of Safety Violations*, WASH. POST, Apr. 7, 2010, at A1.

22. Robert Dreyfuss, *Grover Norquist: ‘Field Marshal’ of the Bush Tax Plan*, NATION, May 14, 2001, at 11, 14.

symbolic but leaving them on the books cannot help but corrode the public's confidence in government.

For the relevant statutes to work as intended, failing agencies must be rescued by the President, the Congress, and their own managers. When none of these institutions launch effective revival efforts, a final symptom of agency dysfunction is manifested. Most of the major health, safety, and environmental statutes were developed in response to signature events; headline-grabbing tragedies used to be followed by law reform.<sup>23</sup> But this dynamic has virtually disappeared. Neither Congress nor the President has exerted leadership to respond to the virtually unregulated hazards of deep-water oil production or deteriorating conditions in underground mining.<sup>24</sup> In fact, of all the examples of dysfunction mentioned at the outset of this Article and explained further below, only two led to the passage of legislation. The recall of dangerous toys prompted passage of the Consumer

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23. An early and notable example is the 1911 Triangle Shirtwaist fire, which led to the enactment of workplace safety laws. See, e.g., Harold Meyerson, Editorial, *A Fire that Still Burns Bright*, WASH. POST, Mar. 23, 2011, at A19. There are several more recent examples. The leakage of the Love Canal's industrial waste into nearby residential basements provoked the enactment of the nation's toxic waste cleanup law. See, for example, Senator Moynihan's statement in 126 CONG. REC. 30,937-39 (1980), which provides a background and chronology of seventy-one "discrete events . . . before . . . there was an effective and reasonably complete response" following "the discovery of trichlorophenols and other hazardous substances" at Love Canal. The statement was delivered during a debate on the Stafford-Randolph compromise bill, which was eventually modified and enacted as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9628, 9651-9662, 9671-9675 (2006 & Supp. II 2008)). Disasters including the Cuyahoga River catching on fire prompted passage of a far stronger version of the Clean Water Act. See, e.g., Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TUL. L. REV. 2279, 2282-90 (1996). The Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended at 33 U.S.C. §§ 1251-1376 (2006)), was "significantly reorganized and expanded in 1972. 'Clean Water Act' became the Act's common name with amendments in 1977." *Summary of the Clean Water Act*, EPA, <http://www.epa.gov/regulations/laws/cwa.html> (last updated Aug. 11, 2011). Trees stunted by acid rain in New England and Canadian forests produced the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

24. Robin Bravender & Katie Howell, *Fallout Begins After Senate's Failure to Act on Energy, Oil Spill*, N.Y. TIMES (Aug. 5, 2010), <http://www.nytimes.com/gwire/2010/08/05/05greenwire-fallout-begins-after-senates-failure-to-act-on-54000.html> ("After the worst oil leak in U.S. history and months of heated negotiations on energy and spill-response legislation, senators will head home for the August recess empty-handed."); Kim Geiger et al., *Miners' Survivors Feel Let Down: A Year After a Blast Killed 29, a Safety Bill has Failed and Efforts to Boost Enforcement are Mired in Appeals*, L.A. TIMES, May 8, 2011, at A18 ("'We've been messing around for a year,' said Rep. George Miller (D- Martinez), who introduced a bill last summer that would have dealt with the backlog and other issues brought to light by the deadly explosion. 'The sad thing is that nothing will happen until the next major disaster.'").

Product Safety Improvement Act (CPSIA) in 2008,<sup>25</sup> but the new law ducked the most pressing issues, doing little to strengthen the Consumer Product Safety Commission's (CPSC) capacity to tackle the threats posed by imported products, and the Republican-controlled House of Representatives is considering legislation to weaken it even further.<sup>26</sup> And although salmonella and E. coli outbreaks in food provoked passage of the Food Safety Modernization Act in 2010,<sup>27</sup> congressional conservatives immediately threatened to defund the new law's implementation, and deep cuts in the new programs created by the statute seem inevitable in the current, politically charged fiscal climate.<sup>28</sup>

Deeming an agency dysfunctional in achieving its statutory missions necessarily depends upon subjective judgment. The continuum of regulatory failure is finegrained and reasonable observers could differ on when oversights and mistakes degenerate into dysfunction. To circumvent disagreements about whether the lines drawn here are reasonable, the following discussion features cases that cannot reasonably be considered close.

Several of these examples involve explosions that are easier to recognize as catastrophes than the relatively slow poisoning of a child who mouths her lead paint-coated toys. Of course, an accident could happen in the best of regulatory systems. But the major industrial disasters discussed in this Article cannot be so easily dismissed: none of the extensive analyses of those incidents referenced here have ever come close to concluding that a responsible company with a strong safety culture that operated in a rigorous regulatory environment was simply ambushed by a freak instance of bad luck. Instead, report after report concludes that the absence of a strong

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25. See Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (codified at 15 U.S.C. §§ 2051–2089 (Supp. II 2008)).

26. See *Congress Should Not Weaken the CPSIA*, CONSUMERS UNION (May 11, 2011), [http://www.consumersunion.org/pub/core\\_product\\_safety/017727.html](http://www.consumersunion.org/pub/core_product_safety/017727.html).

27. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified in scattered sections of 21 U.S.C.). See also Margaret Hamburg, *Food Safety Modernization Act: Putting the Focus on Prevention*, WHITE HOUSE BLOG (Jan. 3, 2011, 4:53 PM), <http://www.whitehouse.gov/blog/2011/01/03/food-safety-modernization-act-putting-focus-prevention>.

28. The new law requires CPSC to develop a risk assessment methodology for identifying potentially dangerous products being shipped into the U.S. within two years of its date of enactment, which was August 14, 2010. See 15 U.S.C. § 2066. The CPSC website does not indicate that this mandate has been fulfilled. See *Section 222. Import Safety Management and Interagency Cooperation*, U.S. CONSUMER PRODUCT SAFETY COMM'N, <http://www.cpsc.gov/about/cpsia/sect222.html#presentations> (last visited May 18, 2011). Republicans have also threatened to defund FDA food safety initiatives. Suzy Khimm, *These GOP Budget Cuts Might Make You Puke (or Worse): How Food Safety Could Fall Victim to the Republicans' Budget-Slashing Mania*, MOTHER JONES (Mar. 9, 2011, 1:01 AM), <http://motherjones.com/politics/2011/03/gop-budget-cuts-food-safety>.

regulatory presence and corporate neglect of safety at the highest levels were proximate causes for accidents that were waiting to happen.<sup>29</sup>

## B. Dysfunction and Failure Epitomized

### 1. Nuclear Plant Maintenance

The tsunami that hit Japan in the spring of 2011 triggered a nuclear crisis that experts attribute to a shockingly lax regulatory system. Japanese regulators and the companies they oversee follow a practice known as *amakudari*, or “descent from heaven,” that provides retired government officials with “comfortable jobs at the companies they regulated.”<sup>30</sup> The practice is a symptom of the nuclear industry’s status as one of Japan’s “most entrenched and coddled interest groups.”<sup>31</sup>

Thankfully, the Japan disaster prompted intensive investigative reporting by the *New York Times* on the effectiveness of the Nuclear Regulatory Commission (NRC), which oversees America’s 104 nuclear power plants. The conclusions were disconcerting to say the least, especially given fervent bipartisan support for a dramatic expansion of nuclear power in this country, including President Obama’s pledge to subsidize the industry to the tune of billions of dollars.<sup>32</sup>

Workers at the Byron nuclear plant in Illinois noticed in the fall of 2007 that piping used to circulate cooling water to essential emergency equipment had corroded through and started to leak, causing a twelve-day shutdown of the plant’s two reactors.<sup>33</sup> The plant’s operator, the Exelon Corporation, had known for years that the piping was degrading, but rather than changing out the corroded equipment, the company kept downgrading its internal guidance on the minimum thickness required for safety.<sup>34</sup> The NRC had failed to inspect the piping for the eight years preceding the leak

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29. See e.g., NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING*, at vii (2011), available at [http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER\\_ReporttothePresident\\_FINAL.pdf](http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf) [hereinafter NAT’L COMM’N ON DEEPWATER HORIZON].

30. Martin Fackler & Hiroko Tabuchi, *Lag in Closing a Japanese Nuclear Plant Reflects Erosion of a Culture of Consensus*, N.Y. TIMES, May 10, 2011, at A4.

31. *Id.*; Yuri Kageyama & Justin Pritchard, *Ties Bind Japan Nuke Sector, Regulators*, ABC NEWS (May 2, 2011), <http://abcnews.go.com/International/wireStory?id=13502692>.

32. See e.g., Matthew Mosk, *Environmental Groups Question Obama’s Support for Nuclear Industry*, ABC NEWS (Mar. 18, 2010), <http://abcnews.go.com/Blotter/obamas-support-nuclear-industry-questioned/story?id=13158078> (reporting, among other evidence of the President’s long-standing support for nuclear power, that he is especially close to Exelon, a nuclear power company headquartered in Chicago).

33. Tom Zeller, Jr., *Nuclear Agency Beset by Lapses*, N.Y. TIMES, May 8 2011, at A1.

34. *Id.*

and, even when the problem came to regulators' attention, they decided only to "reprimand [Exelon] for two low-level violations."<sup>35</sup> If enough pipes had ruptured during a reactor accident, "the result could easily have been a nuclear catastrophe at a plant just 100 miles west of Chicago."<sup>36</sup> Concluding that this troubling episode was symptomatic of pervasive problems at the NRC, the *New York Times* noted that "most of the country's 104 aging reactors are applying for, and receiving, 20-year extensions from the N.R.C [sic] on their original 40-year licenses" and that reform advocates contend that "a thorough review of the system is urgently needed."<sup>37</sup> David Lochbaum, a reactor technology expert who has trained NRC personnel, told the newspaper: "The only difference between Byron and Fukushima is luck."<sup>38</sup>

## 2. Deepwater Oil Production

Less than a year before the Japanese nuclear meltdown, the *Deepwater Horizon*, a drilling rig owned by Transocean and leased by British Petroleum (BP) exploded. Eleven workers were killed by the raging fires that destroyed the rig, and, over the course of several weeks, an estimated 205 million gallons of crude oil spilled into the Gulf of Mexico as the company and its contractors struggled to gain control over the gushing well.<sup>39</sup> The subsequent investigation revealed BP's dismal track record for safety during the decade preceding the spill.<sup>40</sup> Detailed chronologies of the events preceding the explosion reveal cost-cutting measures with grave and systematically ignored implications for safety. For example, four days before volatile gases surged into the well and caused the explosion, BP employees rejected a recommendation by employees of its contractor, Halliburton, that

35. *Id.*

36. *Id.*

37. *Id.*; see also Susan Q. Stranahan, *A More Likely Nuclear Nightmare*, iWATCH NEWS (May 11, 2011, 6:00 AM), <http://www.iwatchnews.org/2011/05/11/4540/more-likely-nuclear-nightmare> (explaining that the risk of fires at the 104 U.S. nuclear power plants was a growing threat because even a small fire could trigger a meltdown but that the NRC "hardly ever issues serious penalties for fires," preferring to rely on "voluntary compliance and slaps on the wrist").

38. Zeller, *supra* note 33.

39. See, e.g., Bradley Blackburn, *BP Oil Spill: Families Gather to Honor 11 Who Died*, *Express Frustration with BP, Transocean*, ABC NEWS (May 25, 2010), <http://abcnews.go.com/WN/bp-oil-spill-transocean-holds-memorial-11-lost/story?id=10739080>; Maureen Hoch, *New Estimate Puts Gulf Oil Leak at 205 Million Gallons*, PBS NEWSHOUR (Aug. 2, 2010, 10:07 PM), <http://www.pbs.org/newshour/rundown/2010/08/new-estimate-puts-oil-leak-at-49-million-barrels.html>.

40. Sarah Lyall, *In BP's Record, a History of Boldness and Costly Blunders*, N.Y. TIMES, July 13, 2010, at A1 ("Despite a catalog of crises and near misses in recent years, BP has been chronically unable or unwilling to learn from its mistakes, an examination of the record shows.").

twenty-one centralizers be installed to secure the well against such risks.<sup>41</sup> “‘It will take 10 hours to install them,’ a BP official said in an internal e-mail. ‘I do not like this.’”<sup>42</sup>

The expert commission appointed by President Obama to investigate the spill resisted strong oil industry pressure<sup>43</sup> to brand BP a “rogue” company, concluding:

The blowout was not the product of . . . aberrational decisions made by rogue industry or government officials . . . . [T]he root causes are systemic and, absent significant reform . . . might well recur. The missteps were rooted in systemic failures by industry management (extending beyond BP to contractors that serve many in the industry), and also by failures of government to provide effective regulatory oversight . . . .<sup>44</sup>

Regulatory failure included the grave mistake of housing the Department of the Interior’s (DOI) entrepreneurial oil leasing program in the same office as the skeletal regulatory staff of the Minerals Management Service (MMS), which was responsible for policing the safety of offshore platforms and rigs.<sup>45</sup> The employees who worked in the leasing unit had a perverse relationship with oil industry executives that included drunken parties and sexual liaisons.<sup>46</sup> This blatant corruption created an atmosphere where aggressive regulation of deepwater safety by staff on the other side of the office was systematically undermined. Even after the advent of the spill, the Obama administration’s response was to divide the two offices into separate divisions for leasing and regulatory oversight, but to leave them reporting to the same boss: DOI Secretary Kenneth Salazar.<sup>47</sup> Significant increases in funding to support adequate inspections has not been forthcoming; as of

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41. Knutson, *supra* note 1.

42. *Id.*

43. See, e.g., John M. Broder, *Oil Executives Break Ranks in Testimony*, N.Y. TIMES, June 16, 2010, at A20 (“The chairmen of four of the world’s largest oil companies broke their nearly two-month silence on the major spill in the Gulf of Mexico on Tuesday and publicly blamed BP for mishandling the well that caused the disaster.”).

44. NAT’L COMM’N ON DEEPWATER HORIZON, *supra* note 29, at 122.

45. *Id.* at 55; Press Release, U.S. Dep’t of the Interior, Salazar Swears-In Michael R. Bromwich to Lead Bureau of Ocean Energy Management, Regulation and Enforcement (June 21, 2010), available at <http://www.doi.gov/news/pressreleases/Salazar-Swears-In-Michael-R-Bromwich-to-Lead-Bureau-of-Ocean-Energy-Management-Regulation-and-Enforcement-Secretarial-Order-begins-reorganization-of-former-mms.cfm>.

46. See, e.g., Jason DeParle, *Minerals Service Had a Mandate to Produce Results*, N.Y. TIMES, Aug. 8, 2010, at A1 (“The causes of the spill remain unclear, but a number of the agency’s actions have drawn fire . . . . The story has gained a bacchanal gloss because agency employees in Louisiana and Colorado took meals, gifts and sporting trips paid for by the industry, and several Colorado officials had sex and used drugs with industry employees.”).

47. U.S. Dep’t of the Interior, *supra* note 45.

June 2011, seventy-nine inspectors were trying to cover all of the site visits to some 3,500 rigs and platforms.<sup>48</sup> The extraordinarily difficult task of conducting meaningful inspections is made even more challenging by the fact that these facilities are located many miles offshore.<sup>49</sup> Investigative reporting by the *Wall Street Journal* noted that a “small cadre” of inspectors armed with “checklists and pencils” had failed to make much of a dent in overseeing offshore operations throughout the Gulf:

[T]hese inspectors have been overruled by industry, undermined by their own managers, and outmatched by the sheer number of offshore installations they oversee. Inspectors come into the job with little or no hands-on experience in deep-water drilling, learning as they go.

[They] are largely checking hardware [and] get good marks for reducing workplace injuries on rigs and platforms. But safety experts say the main causes of major accidents are almost always human error, not the mechanical failures that inspectors focus on. Inspectors aren’t looking for signs of systemic safety problems—poor decisions, cutting corners, muddled responsibilities—that investigators are linking to the *Deepwater Horizon* explosion . . . .

No one knows if a more robust and sophisticated inspection program could have detected [the problems that caused the *Deepwater Horizon*] explosion. But there is broad agreement among safety experts that a massive overhaul is needed to create the kind of inspection program that can help avoid such disasters in the future.<sup>50</sup>

### 3. Underground Mining Hazards

The same month as the *Deepwater Horizon* explosion, the worst mine disaster in forty years killed twenty-nine men in Montcoal, West Virginia at the Upper Big Branch facility owned by Massey Energy, a perennial violator of mine safety laws.<sup>51</sup> The accident was caused by a buildup of methane gas that exploded, causing shafts a thousand feet deep to collapse.<sup>52</sup>

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48. Ben Geman, *Interior Beefs Up Offshore Inspections with Multiperson Teams*, HILL BLOG (June 13, 2011, 3:18 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/166105-interior-beefs-up-offshore-inspections-with-multi-person-teams>.

49. See Leslie Eaton et al., *Inspectors Adrift in Rig-Safety Push*, WALL ST. J., Dec. 3, 2010, at A1.

50. *Id.*

51. Urbina, *supra* note 1.

52. See, e.g., Mufson et al., *supra* note 21.



The Department of Justice charged the mine's security chief with two felonies for making false statements and obstructing justice, and President Obama said, "We cannot bring back the men we lost. What we can do, in their memory, is thoroughly investigate this tragedy and demand accountability."<sup>53</sup>

In the spring of 2010, a team led by J. Davitt McAteer, who headed MSHA under President Clinton, reported to the Governor of West Virginia on the causes of the Big Branch tragedy.<sup>54</sup> Like the reports on BP's track record before the *Deepwater Horizon* spill, the investigation revealed that MSHA inspectors had previously discovered serious violations in the systems that failed spectacularly during the Big Branch explosion, including incidents involving the accumulation of explosive methane gas, the malfunctioning of required ventilation systems, and the failure to clear coal dust from active mineshafts in order to prevent it from becoming a fire-spreading fuel during an explosion.<sup>55</sup> The inspectors issued routine citations against the company, but did not manage to use their ample enforcement authority with enough force to deter the continuation of these life-threatening conditions.<sup>56</sup> This passivity is made all the more remarkable by the fact that Massey Energy had the worst fatality record in the country: during the period from 2000 to 2010, fifty-four of its miners died on the job.<sup>57</sup>

A little over a year after the Big Branch tragedy, MSHA undertook a surprise inspection at another Massey mine in West Virginia.<sup>58</sup> The inspectors discovered two dozen safety violations that could trigger fires and explosions and ordered the evacuation of all miners from threatened portions of the facility.<sup>59</sup> "The conduct and behavior exhibited when we caught the mine operator by surprise is nothing short of outrageous," said MSHA

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53. Press Release, Dep't of Justice, Upper Big Branch Security Chief Charged with Additional Count of Making False Statement to MSHA Investigative Team (May 17, 2011), available at [http://www.justice.gov/usao/wvs/press\\_releases/May%202011/51711Stover%20press%20release.pdf](http://www.justice.gov/usao/wvs/press_releases/May%202011/51711Stover%20press%20release.pdf) (charging Hughie Stover, Chief of Security at Upper Big Branch, with a third charge in addition to two felony charges resulting from an investigation of the explosion); Press Release, The White House, Statement by President Obama on the Big Branch Mine (Apr. 10, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-president-obama-upper-big-branch-mine>.

54. J. DAVITT MCATEER, ET AL., UPPER BIG BRANCH (2011), available at [http://www.nytimes.com/interactive/2011/05/20/us/20110520\\_MINE\\_REPORT\\_DOC.html](http://www.nytimes.com/interactive/2011/05/20/us/20110520_MINE_REPORT_DOC.html).

55. *Id.* at 16.

56. *Id.* at 82–84.

57. *Id.* at 93.

58. Howard Berkes, *Serious Safety Lapses Shut Down Parts of Massey Coal Mine*, NPR BLOG (May 3, 2011, 10:33 PM), <http://www.npr.org/blogs/thetwo-way/2011/05/04/135972287/serious-safety-lapses-shut-down-parts-of-massey-coal-mine>.

59. *Id.*

head Joe Main.<sup>60</sup> Meanwhile, the *Los Angeles Times* reported about a week later, the agency was making little progress on a backlog of nineteen thousand pending appeals of citations for safety violations filed by mining companies.<sup>61</sup> A provision in the law allows companies to avoid penalties that might motivate more diligent compliance while their appeals are pending.<sup>62</sup> MSHA's inability to process those appeals further undermines its effectiveness.

The Massey Energy example drives home the reality that federal regulators have gotten to the point that they cannot effectively cope with chronic and egregious violations by companies that regard the regulatory system with disdain, even after catastrophes that should put an end to such lethargy.

#### 4. Coal Ash Dumps

In the early morning hours of December 22, 2008, an earthen dam holding back an eighty-acre "surface impoundment" (the technocratic euphemism for a water-logged dump dug into the ground) at a Tennessee Valley Authority (TVA) power plant broke, releasing 1.1 billion gallons of inky coal ash sludge across Kingston, Tennessee and neighboring towns.<sup>63</sup> The flood crossed a river, damaging more than one hundred homes and infiltrating several streams that bisected the area, ultimately covering three hundred acres in four to five feet of sludge and mud. Miraculously, no one was killed. In the aftermath of the disaster, EPA Administrator Lisa Jackson promised to re-evaluate the agency's decades-old reluctance to regulate the disposal of some 144 million tons of coal ash generated annually, vowing to issue her conclusions within a year.<sup>64</sup> Jackson met this deadline, but her efforts were derailed when an intensive industry lobbying campaign provoked OIRA to rewrite the EPA proposal, adding two significantly weaker options and derailing the momentum of the rule: it will not see the light of day until later this year, at the earliest.<sup>65</sup>

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60. *Id.*

61. Geiger et al., *supra* note 24.

62. *Id.*

63. Samira Simone, *Tennessee Sludge Spill Runs Over Homes, Water*, CNN (Dec. 23, 2008), [http://articles.cnn.com/2008-12-23/us/tennessee.sludge.spill\\_1\\_kingston-fossil-plant-sludge-coal-plant?\\_s=PM:US](http://articles.cnn.com/2008-12-23/us/tennessee.sludge.spill_1_kingston-fossil-plant-sludge-coal-plant?_s=PM:US); Stephanie Smith, *Months After Ash Spill, Tennessee Town Still Choking*, CNN (July 13, 2009), [http://articles.cnn.com/2009-07-13/health/coal.ash.illnesses\\_1\\_coal-ash-drinking-water-coal-power-plant?\\_s=PM:HEALTH](http://articles.cnn.com/2009-07-13/health/coal.ash.illnesses_1_coal-ash-drinking-water-coal-power-plant?_s=PM:HEALTH); *Toxic Tsunami*, NEWSWEEK (July 18, 2009, 8:00 PM), <http://www.newsweek.com/2009/07/17/toxic-tsunami.html>.

64. Simone, *supra* note 63; Smith, *supra* note 63; *Toxic Tsunami*, *supra* note 63.

65. James Goodwin, *The Delays Get Delayier: The Sad First Year of EPA's Coal Ash Proposal*, CPR BLOG (May 4, 2011), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=BB2B286A-9713-BCF4-C74CD4C1151572A8>.

Several highly toxic constituents are present in trace amounts in coal, including cadmium, chromium, lead, and mercury; burning the fuel concentrates these contaminants in the ash left after combustion.<sup>66</sup> When coal ash is disposed in leaking dumps, these materials migrate into soil and water, threatening people and wildlife.<sup>67</sup>

The threat of another catastrophe along the lines of the Kingston spill is particularly acute for surface impoundments: some 186 of the 584 such facilities estimated to be operating in the U.S. were not designed by a professional engineer; 56 impoundments are older than fifty years, 96 are older than forty years, and 340 are somewhere between twenty-six and forty years old.<sup>68</sup> EPA has characterized forty-nine coal ash dump sites in several different states as having high hazard potential, including the Little Blue Run ash basin in Beaver County, Pennsylvania, which is thirty times larger than the Kingston facility.<sup>69</sup>

Unless and until a protective federal rule goes into effect, regulation of coal ash disposal sites will remain the province of the states, which have a checkered track record on controlling leakage and preventing spills. State environmental agencies vary widely in the resources they have available and the stringency of the regulations they have adopted to supplement the floor of federal requirements. So, for example, a federal government study found that in the eleven states where coal-fired power plants produce half the ash generated nationwide, approximately thirty percent of such waste is potentially exempt from regulation.<sup>70</sup>

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66. Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. 35,128, 35,153 (proposed June 21, 2010) (to be codified at 40 C.F.R. pts. 257, 261, 264, 265, 268, 271, 302).

67. *Id.* EPA estimated that in 2004 31% of landfills and 62% of surface impoundments devoted to coal ash disposal lacked liners to contain hazardous constituents from leaching into underground aquifers, while 10% of such landfills and 58% of such impoundments did not have any system for monitoring leaks. *Id.* at 35,151.

68. *Id.* at 35,153.

69. See, e.g., Brian Bowling, 'High Hazard' Ash Basin in Beaver County Called Safe, PITTSBURGH TRIB.-REV. (Dec. 25, 2008), [http://www.pittsburghlive.com/x/pittsburghtrib/news/regional/s\\_604497.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/regional/s_604497.html); *Fact Sheet: Coal Combustion Residues (CCR)-Surface Impoundments with High Hazard Potential Ratings*, EPA, <http://www.epa.gov/waste/nonhaz/industrial/special/fossil/ccrs-fs/index.htm> (last updated Aug. 2009).

70. Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. at 35,151.

## 5. Tainted Food

In the fall of 2008, a high number of illnesses and deaths caused by salmonella poisoning<sup>71</sup> alerted Minnesota health officials that they should commence a “trace-back” study, an arduous process that involves detailed interviews with people who have become ill to discover common food sources.<sup>72</sup> Public health graduate students who worked for the state part-time and were jokingly called the “Diarrhea Squad”<sup>73</sup> discovered that peanut products supplied to schools, nursing homes, and other institutions and manufactured by the Peanut Corporation of America (PCA) were the culprits.<sup>74</sup> The paste, which was used in more than 2,000 categories of products, ultimately killed nine and sickened thousands.<sup>75</sup>

PCA had two processing plants: one in Blakely, Georgia and a second in Plainview, Texas. Investigations by the media and congressional overseers determined that the Blakely plant operators knowingly shipped the contaminated products to their customers after the paste had tested positive for salmonella.<sup>76</sup> The Texas plant operated without a required state license and had not been inspected by state officials for nearly four years.<sup>77</sup> The Georgia plant was awash in outright safety violations and bad management practices, including a leaking roof, mold growing on ceilings and walls,

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71. For a description of these events, see *The Salmonella Outbreak: The Continued Failure to Protect the Food Supply: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy & Commerce*, 111th Cong. 5 (2009) [hereinafter *The Salmonella Hearings*]; Rena Steinzor, *High Crimes, Not Misdemeanors: Deterring the Production of Unsafe Food*, 20 HEALTH MATRIX 175, 176 (2010).

72. For a description of this methodology, see *The Salmonella Hearings*, *supra* note 71, at 2–3 (statement of Stephen F. Sundlof, Director of the Center for Food Safety and Applied Nutrition at the Food and Drug Administration).

73. *I’m A Pepper, You’re A Pepper, He’s A Pepper Too*, KAVIPS (July 31, 2008), <http://kavips.wordpress.com/2008/07/31/im-a-pepper-youre-a-pepper-hes-a-pepper-too/>.

74. *The Salmonella Hearings*, *supra* note 71, at 3–5.

75. Andrew Martin, *Troubled Peanut Company Files for Bankruptcy Protection*, N.Y. TIMES, Feb. 14, 2009, at B2 (citing data from the Centers for Disease Control and Prevention tying 637 illnesses and nine deaths to the salmonella outbreak); see also Elizabeth Weise & Julie Schmit, *Health Risks May Reach Far Beyond Reported Victims*, USA TODAY, Feb. 10, 2009, at 1A (“The conventional wisdom among epidemiologists . . . is that for each case of salmonellosis that is reported, more than 38 other people get sick but don’t go to their doctor or get tested.”).

76. *The Salmonella Hearings*, *supra* note 71, at 7 (statement of Stephen F. Sundlof, Director of the Center for Food Safety and Applied Nutrition at the Food and Drug Administration); see also Gardiner Harris, *Peanut Product Recall Grows in Salmonella Scare*, N.Y. TIMES, Jan. 29, 2009, at A15 (reporting that salmonella contamination was a chronic problem at the plant).

77. Gardiner Harris, *After Tests, Peanut Plant in Texas Is Closed*, N.Y. TIMES, Feb. 11, 2009, at A14 (reporting on the closure of the Texas plant and interviews with its former employees who said it was “disgusting” and shared many of the problems reported about the Georgia plant); Martin, *supra* note 75.

rodent infestation, filthy nut processing receptacles, feathers and feces in its air filtration system, and a broken roaster used to sterilize the peanuts before they were ground into paste.<sup>78</sup>

Georgia state inspectors, who were contracted to inspect their state's food processors by the FDA, visited the plant multiple times from 2006–08 without forcing a halt to these practices.<sup>79</sup> Both plants closed, the company declared bankruptcy, and FDA officials opened a criminal investigation.<sup>80</sup> Two years later, PCA's chief executive officer was discovered serving as a consultant to the peanut industry.<sup>81</sup> As mentioned earlier, a lame-duck Democratic-controlled Congress did manage to pass legislation strengthening the FDA's regulatory authority over the domestic food industry, but House Republicans almost immediately launched efforts to defund these programs.<sup>82</sup>

## 6. Dangerous Imports

During 2007, manufacturers and retailers agreed to recall millions of toys from store shelves and homes following the discovery that these Chinese imports were coated with lead paint;<sup>83</sup> paint made with lead is two thirds cheaper in China than the safe variety.<sup>84</sup> Toy industry experts predicted that such large, attention-grabbing recalls would continue.<sup>85</sup> After

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78. Inspectional Observations of Peanut Corporation of America, U.S. FDA (Feb. 4, 2009), <http://www.fda.gov/downloads/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/UCM109834.pdf>; Martin, *supra* note 75.

79. Lyndsey Layton, *Every Peanut Product from Ga. Plant Recalled*, WASH. POST, Jan. 29, 2009, at A1 (reporting that Georgia inspectors consistently played down deficiencies); Roni Caryn Rabin, *Peanut Plant Had History of Health Lapses*, N.Y. TIMES, Jan. 27, 2009, at A23 (reporting that state inspectors found areas of rust that could flake into food, gaps in warehouse doors big enough for rodents to get through, unmarked spray bottles and containers, and numerous other violations without taking effective action to compel the company to correct these conditions).

80. Rob Stein, *FDA Investigating Peanut Company Behind Recall*, WASH. POST, Jan. 31, 2009, at A2; Martin, *supra* note 75.

81. Mary Clark Jalonick, *Back to Work After Salmonella Case*, ABC NEWS (Sept. 8, 2010), <http://abcnews.go.com/Business/wireStory?id=11580976>.

82. Lyndsey Layton, *House Republicans Vote to Cut Millions from Food Safety Funds*, WASH. POST, June 16, 2011, at A5 (“Rep. Jack Kingston (R-Ga.), chairman of the House subcommittee that wrote the agriculture appropriations bill, said the cuts to food safety were justified because the nation's food supply was ‘99.99 percent safe.’”).

83. Coglianese et al., *supra* note 1, at 3.

84. See, e.g., David Barboza, *Why Lead in Toy Paint? It's Cheaper*, N.Y. TIMES, Sept. 11, 2007, at C1; *China Signs Pact to Ban Lead Paint in Export Toys*, N.Y. TIMES, Sept. 12, 2007, at C9.

85. “If I went down the shelves of Wal-Mart and tested everything, I'm going to find serious problems,” said Sean McGowan, a toy industry investment expert. Louise Story & David Barboza, *Mattel Recalls 19 Million Toys Sent from China*, N.Y. TIMES, Aug. 15, 2007, at A1. “The idea that Mattel—with its high standards—has a bigger problem than everybody

all, an astounding eighty percent of toys sold in America are manufactured in China, which has no effective regulatory systems.<sup>86</sup> Chinese executives admitted that their government does not inspect factories and that, although a national standard theoretically limits lead levels in consumer products, no one enforces it.<sup>87</sup>

Few subsequent recalls have occurred in the United States, raising the specter that ongoing problems have overwhelmed CPSC, the smallest and most dysfunctional of the protector agencies.<sup>88</sup> The agency has a miniscule annual budget of \$105 million despite its responsibility to oversee the safety of some fifteen thousand categories of dangerously defective products. This scant amount supports approximately 483 Full Time Equivalent employees (FTEs),<sup>89</sup> in contrast to the 891 FTEs it had on staff in FY 1981. The American population increased by thirty-six percent during that same period.<sup>90</sup>

In a similar but more recent episode, sulfur-infused drywall—once again imported from China—was installed in thousands of homes throughout the Southeast.<sup>91</sup> Fumes from the poisoned product corroded pipes and wiring, ruined new appliances, and caused headaches and severe respiratory illness for homeowners and other occupants.<sup>92</sup> The problem received widespread media attention, especially in the South, where hot, humid weather exacerbated the release of fumes. CPSC has no authority to force Chinese

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else is laughable. If we don't see an increase of recalls in this industry, then it's a case of denial.'” *Id.*

86. Barboza, *supra* note 84; Andrew Martin, *More Ripples from Chinese Product Troubles*, N.Y. TIMES, Aug. 15, 2007, at C1. For a general discussion of environmental conditions in China and the inadequacy—indeed, the virtual absence—of effective regulation, see ALEXANDRA HARNEY, *THE CHINA PRICE: THE TRUE COST OF CHINESE COMPETITIVE ADVANTAGE* (2008).

87. Barboza, *supra* note 84.

88. The CPSC website lists recalls chronologically, reciting the reason for the recall and the country of manufacture. See U.S. CONSUMER PROD. SAFETY COMM'N, *Toy Hazard Recalls*, <http://www.cpsc.gov/cpscpub/prerel/category/toy.html> (last visited Aug. 16, 2011). Since 2007, a handful of recalls have occurred because of lead paint. *Id.*

89. U.S. CONSUMER PROD. SAFETY COMM'N, *supra* note 7, at vi.

90. In 1980, the midyear population in the U.S. was 227.2 million. U.S. CENSUS BUREAU, *International Data Base*, <http://www.census.gov/ipc/www/idb/country.php> (last updated June 2010). By 2010 the population had increased to 308.7 million people. U.S. CENSUS BUREAU, *POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010* (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

91. Joaquin Sapien & Aaron Kessler, *Federal Probe of Chinese Drywall Falls Short*, SARASOTA HERALD-TRIB., Dec. 15, 2010, at A1.

92. See, e.g., Wayne, *supra* note 1; *\$2.6m Awarded over Corrosive Drywall*, BOSTON GLOBE, Apr. 9, 2010, at A2 (“Thousands of homeowners—mostly in Florida, Virginia, Mississippi, Alabama, and Louisiana—have reported problems with the drywall, which was imported in large quantities during the housing boom and after a string of Gulf Coast hurricanes.”).

manufacturers to recall the defective drywall and has not even managed to determine the origin or extent of the problem.<sup>93</sup> When consumers complained that the problem was also present in drywall manufactured in the United States, CPSC was further embarrassed when it launched an investigation of conditions in eleven homes, concluding that five suffered from the drywall sulfur problem, but declaring that it was unable to determine the origin of the offending drywall because it lacked the resources to complete the investigation.<sup>94</sup> The drywall problem will be left to the tort system to resolve, turning the clock back to the days before CPSC and its sister agencies were created to prevent such injuries.

## 7. Refinery Explosions

In what should have been a wake-up call for BP's top managers, a 2005 explosion killed fifteen at the third-largest refinery in the country, located in Texas City, Texas.<sup>95</sup> The accident was preceded by numerous warnings from company consultants and managers that fatal accidents were the inevitable consequence of relentless cost cutting.<sup>96</sup> OSHA assessed a fine of \$21 million, one of the largest in the agency's history.<sup>97</sup> But the company ignored the provisions of the consent decree requiring it to make changes to the facility's operations, triggering a subsequent \$50 million fine for repeat violations.<sup>98</sup>

The U.S. Chemical Safety and Hazard Investigation Board (CSB) filed an "investigation report" on the Texas City incident, evaluating OSHA's role in the disaster.<sup>99</sup> It found that the agency had conducted several inspections at the plant, primarily in response to other fatalities, but that it never identified the likelihood of such a "catastrophic incident."<sup>100</sup> This omission

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93. Sapien & Kessler, *supra* note 91 (reporting that the "federal government is woefully unequipped to help them with a product defect as expensive and widespread as this one").

94. Joaquin Sapien, *CPSC Report on U.S.-Made Drywall Raises More Questions Than Answers*, PROPUBLICA (Apr. 21, 2011, 2:48 PM), <http://www.propublica.org/article/cpsc-report-on-u.s.-made-drywall-raises-more-questions-than-answers-110421/single>.

95. Knutson, *supra* note 1.

96. *Id.* (reporting that "[n]ew managers who arrived at the refinery were often shocked by the state of the facility" and that Don Parus, the plant manager who took over the plant in 2002, became so desperate that in 2004 he showed BP executives pictures of workers who had died at the plant, pleading for no more cost cutting); *Don Parus' Powerpoint Presentation*, document acquired for *The Spill*, FRONTLINE (2004), available at <http://www.pbs.org/wgbh/pages/frontline/the-spill/bp-troubled-past/don-parus-powerpoint.html>.

97. See, e.g., Marian Wang, *BP Agrees to Pay \$50 Million for Earlier Texas City Problems*, PROPUBLICA BLOG (Aug. 12, 2010, 4:32 PM), <http://www.propublica.org/blog/item/bp-agrees-to-pay-50-million-for-earlier-texas-city-problems>.

98. *Id.*

99. U.S. CHEM. SAFETY & HAZARD INVESTIGATION BD., INVESTIGATION REPORT: REFINERY EXPLOSION AND FIRE, REPORT NO. 2005-04-1-TX (2007).

100. *Id.* at 20.

is especially surprising because the agency discovered “301 egregious willful [sic] violations” in the immediate aftermath of the explosion at the processing unit that was the origin of the blast.<sup>101</sup> Equally incredible, two years after the Texas City incident OSHA still had not conducted “a comprehensive inspection of any of the other 29 process units at the Texas City refinery.”<sup>102</sup>

The CSB further concluded that OSHA’s approach to refinery safety fell far short of the standards set by other enforcement agencies, including state-run programs in Nevada and California, as well as Britain’s Health and Safety Executive.<sup>103</sup> It estimated that about fifteen thousand facilities engage in sufficiently high hazard industrial processes to have a comparable potential for a catastrophic incident, but that OSHA only had one small team of inspectors competent to discover violations and issue corrective orders at such locations.<sup>104</sup> Just as the CSB warned might happen, in April 2010 seven died in an accident at a Tesoro refinery in Anacortes, Washington.<sup>105</sup>

### C. Root Causes

Dysfunction is a phenomenon that feeds rapaciously on itself, especially in periods when deregulatory campaigns are waxing. The worse the agencies do, the more impassioned the condemnation meted out by their critics at both ends of the political spectrum becomes. Paradoxically, health, safety, and environmental agencies responsible for policing increasingly hazardous activities have seen budgeting that, in constant dollars, has been

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101. *Id.* at 20.

102. *Id.* at 20.

103. *Id.* at 204–05.

104. *Id.* at 204, 207.

105. Aaron Clark & Jessica Resnick-Ault, *Tesoro Blast Shows Pattern of Refinery Safety Problems, Investigator Says*, BLOOMBERG (Apr. 2, 2010, 7:22 PM), <http://www.bloomberg.com/news/2010-04-02/tesoro-blast-shows-pattern-of-refinery-safety-problems-investigator-says.html> (“The accident ‘appears to have the most fatalities of any accident since BP Texas City,’ Daniel Horowitz, a spokesman for the U.S. Chemical Safety and Hazard Investigation Board said. . . . The board is extremely concerned about the pattern of safety problems in the refining sector.”); *see also* News Release, Wash. State Dep’t. of Labor & Indus., L&I Focus on Petroleum Refinery Safety Finds Multiple Violations at Tesoro (Apr. 15, 2009), available at <http://www.lni.wa.gov/news/2009/pr090415a.asp> (reporting that one year before the fatal explosion at the Anacortes facility, state regulators cited the company for seventeen “serious” safety and health violations, where “serious” was defined as having the potential to result in “death or serious physical injury”); Phuong Le, *Tesoro Refinery Fined \$2.39M in Blast*, NEWS TRIB. (Oct. 5, 2010, 6:48 AM), <http://www.thenewstribune.com/2010/10/05/1369085/refinery-fined-239m-in-blast.html>.



flat for three decades.<sup>106</sup> The more their performance degenerates, the more they are abused. During crises, these destructive trends are intensified as, for example, when President Obama's sharpest critics immediately pronounced the Gulf spill his "Hurricane Katrina."<sup>107</sup>

Five root causes rise above all the others as synergistic factors that accelerate agency dysfunction: (1) severe funding shortfalls that cripple any reasonable efforts to fulfill statutory mandates; (2) outmoded legal authority that leaves the agencies without the tools they need to deter irresponsible corporate behavior; (3) political opportunism and bureaucracy bashing that erodes their credibility and morale; (4) a crisis within the civil service as mid-level and senior career managers retire and recruitment of talented replacements from the private sector becomes ever more difficult; and (5) in a few discrete but notable instances, outright capture of agency personnel by the industries they regulate.

### 1. Funding Shortfalls

Most of the protector agencies are funded by general taxpayer revenues. The two exceptions are the NRC, which receives ninety percent of its funding from licensing fees,<sup>108</sup> and the FDA, which gains significant support for its drug approval<sup>109</sup> and food safety<sup>110</sup> programs from industry fees. Fee-based funding is more likely to produce stability for the agencies in difficult economic times because it is immune from the deficit mania embraced by both political parties.

Agencies funded by general taxpayer revenue have experienced steady declines in available resources since the mid-1980s, when the severe Reagan administration budget cuts took hold.<sup>111</sup> In constant dollars, their fiscal resources now stand at roughly the same levels as they did at that time,

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106. See, e.g., RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT* 54–71 (2010).

107. Mimi Hall et al., *Is Oil Spill Becoming Obama's Katrina?*, USA TODAY, May 27, 2010, at A1.

108. *License Fees*, U.S. NUCLEAR REGULATORY COMM'N, <http://www.nrc.gov/about-nrc/regulatory/licensing/fees.html> (last updated Mar. 31, 2011).

109. See Prescription Drug User Fee Act of 1992, Pub. L. No. 102-571, 106 Stat. 4491 (codified as amended in scattered sections of 21 U.S.C.).

110. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011).

111. The Reagan administration accomplished sharp cuts in certain aspects of domestic spending, including the funding for protector agencies, but managed to amass a huge deficit by increasing spending in other areas, such as defense, while simultaneously reducing taxpayer support. See, e.g., KENNETH JANDA ET AL., *THE CHALLENGE OF DEMOCRACY: AMERICAN GOVERNMENT IN A GLOBAL WORLD* 564–65 (10th ed. 2009) ("Although [it] reduced inflation and unemployment . . . and worked largely as expected in the area of industry deregulation, Reaganomics failed massively to reduce the budget deficit . . .").

despite the steady growth of the U.S. population and economy, the advent of globalization, and the expansion of such high-risk activities as deepwater oil production.<sup>112</sup>

In addition to deficit mania and indiscriminate attacks on big government as an evil in and of itself, another reason why these problems persist is the bravado of political appointees. Once the President has finalized his budget, his political appointees support it whether or not they are satisfied with the resources allotted for their work. Agency heads also appear unwilling to admit that their agencies labor under the constraints of scant funding. Whining about money and its effect on their performance would almost certainly earn the enmity of White House staffs that embrace the philosophy of never letting anyone see the President—or his team—sweat. These realities are increasingly unfortunate because one of the only ways to shift the entrenched dynamic of under-funding is for experienced federal managers to explain its implications to Congress, the White House, and the public.

## 2. Inadequate Legal Authority

Employers who “willfully” disregard safety standards, with the result that workers are killed on the job, face a maximum prison term of six months, while tourists who “harass” a wild burro or horse in a national park face up to one year in jail.<sup>113</sup> Up until 2010, the FDA was compelled to coax food processors to undertake recalls voluntarily because it lacked authority to order the remedy.<sup>114</sup> The Clean Water Act does not provide EPA with the authority to regulate rain-induced runoff from pesticide and fertilizer-soaked fields even though these heavily contaminated discharges degrade water quality in many locations.<sup>115</sup>

Like traditional police departments, the protector agencies lack the resources to inspect every regulated facility on a routine basis, and must instead rely on a relatively small number of high-profile prosecutions to

112. For a detailed analysis of these historical trends, see STEINZOR & SHAPIRO, *supra* note 106, at 54–71.

113. Compare Wild Free-Roaming Horses and Burros Act of 1971, Pub. L. No. 92-195, § 8, 85 Stat. 649, 650–51 (justifying the penalty on the grounds that “Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West”), with Occupational Safety and Health Act § 17, 29 U.S.C. § 666 (2006).

114. See, e.g., *Background on the FDA Food Safety Modernization Act (FSMA)*, FDA, <http://www.fda.gov/Food/FoodSafety/FSMA/ucm239907.htm> (last updated Apr. 20, 2011).

115. See, e.g., *Nonpoint Source: Introduction*, EPA, <http://water.epa.gov/polwaste/nps/nonpoint1.cfm> (last updated Nov. 24, 2009) (“The Act’s enforceable provisions are directed at discharges from point sources—regulating the discharge of pollutants to surface waters from pipes, outlets, and other discrete conveyances . . . . Yet water pollution from nonpoint sources remains a substantial contributor to the impairment of waters across the nation.”).

deter violations by similarly situated companies.<sup>116</sup> Dwindling resources make such prosecutions difficult to pursue and, as the MSHA backlog of nineteen thousand appeals illustrates, companies take full advantage of legal loopholes and other opportunities to slow prosecutions down.<sup>117</sup> As enforcement falters, companies realize that it makes more economic sense to ignore legal requirements that will compel expensive capital investments—for example, the installation of pollution control equipment—and run the risk of discovery. Even when caught, the penalties they must pay may not cost nearly as much as the original, avoided investment.

### 3. Political Abuse, Interference, and Neglect

Congress is a fickle mistress, quick to defund and even quicker to blame the bureaucracy when lack of resources undermines its capacity to prevent regulatory failures. Bureaucrats are often first at hand for well-publicized ridicule by congressional committees when anything goes wrong, as well as when agencies attempt to issue stronger requirements to prevent such disasters. Although it is difficult to imagine, matters have not improved much since former Republican Majority Leader Tom Delay compared EPA to the Nazi Gestapo on the House floor.<sup>118</sup> Today, House Republican leaders warn the EPA Administrator that they “are reserving a parking space for her because she’ll have to make frequent stops to justify her every move.”<sup>119</sup>

One other aspect of the problem deserves mention. President Obama’s administration has been characterized by the appointment of several high-level “czars,” including Carol Browner, the Clinton-era EPA Administrator who preferred to work within the White House instead of asking for her old job back. Assigned the ambiguous portfolio of trouble shooting on “energy and environment,” Browner was featured in an early story in the *New York Times* introducing the President’s “inner circle,” with the implication that she was more powerful than EPA Administrator Lisa Jackson.<sup>120</sup> This divided authority did little to assuage poor morale at EPA or other

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116. For an excellent discussion of deterrence-based enforcement, see Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998).

117. Geiger et al., *supra* note 24.

118. Bruce Burkhard, *Year in Review: Congress vs. Environment: Environmental Laws Suffer Under GOP-Controlled Congress*, CNN (Dec. 29, 1995, 12:50 AM), [http://www.cnn.com/EARTH/9512/congress\\_enviro/](http://www.cnn.com/EARTH/9512/congress_enviro/).

119. Tom Moran, Editorial, *EPA Chief Lisa Jackson Braces for Battle with Congress over Climate Change Regulations*, STAR-LEDGERBLOG (Dec. 12, 2010, 5:55 AM), [http://blog.nj.com/njv\\_editorial\\_page/2010/12/epa\\_chief\\_lisa\\_jackson\\_braces.html](http://blog.nj.com/njv_editorial_page/2010/12/epa_chief_lisa_jackson_braces.html).

120. Matthew L. Wald, *Obama’s Inner Circle, Members and Maybes: Carol M. Browner*, N.Y. TIMES, Nov. 29, 2008, at A15.

protector agencies. Browner ultimately resigned from her position and has not yet been replaced, a positive development for Jackson amongst a tide of negative ones.<sup>121</sup>

The effect of a countervailing White House center of power on Jackson's credibility and authority is especially important because EPA has served as the favorite target for deregulatory movements since it was created in 1970.<sup>122</sup> Beyond diluting their influence through White House czars—the OIRA Administrator is typically referred to as the “regulatory czar” by reporters<sup>123</sup>—it is also difficult to think of a single instance where a President affirmatively and publicly defended an EPA Administrator in times of trouble, sending a potent message that the agency must go it alone when under fire.

With one notable exception, commentators who support centralized review not only are untroubled by its use to suppress proactive regulation, but they also extol the idea that the President must be the ultimate backstop for unduly enthusiastic bureaucracies.<sup>124</sup> But in an article entitled *Presidential Administration*, then-professor and now-Supreme Court Justice Elena Kagan argues that the potential for presidential support for an agency's affirmative agenda is a strong argument favoring centralization.<sup>125</sup> She explains that President Clinton adopted the agenda of FDA Commissioner David Kessler to intensify the battle against teen smoking, arguing that this episode illustrates how a more supportive version of unitary executive oversight could give agencies tremendous credibility.<sup>126</sup> This point is true as far as it goes, which is far enough to provide a model of behavior for other Presidents but not nearly far enough to justify the elaborate system of centralized White House review now in operation. For one thing, it is difficult to think of another comparable example of such sustained presidential support. For another, Kessler's initiative was decimated by the Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.*, which concluded that the agency needed congressional authorization to expand its jurisdiction in this matter.<sup>127</sup> In any event, the use of executive power to support agencies on important

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121. Moran, *supra* note 119; Bryan Walsh, *Politics: The Republican War on the EPA Begins—But Will They Overreach?*, TIME ECOCENTRIC BLOG (Feb. 9, 2011, 5:14 PM), <http://ecocentric.blogs.time.com/2011/02/09/politics-the-republican-war-on-the-epa-begins%E2%80%94but-will-they-overreach/>.

122. See *infra* Part II.

123. See, e.g., Jonathan Weisman & Jess Bravin, *Obama's Regulatory Czar Likely to Set a New Tone*, WALL ST. J. (Jan. 8, 2009), <http://online.wsj.com/article/SB123138051682263203.html>.

124. See, e.g., Croley, *supra* note 14; DeMuth & Ginsburg, *supra* note 14; Graham et al., *supra* note 14; Hahn & Litan, *supra* note 14.

125. See Kagan, *supra* note 13, at 2282–84.

126. *Id.*

127. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

issues can occur whether or not the White House pursues centralized regulatory review through OIRA.

#### 4. Civil Service Brain Drain

Political scientist Frances Rourke once wrote:

The fact that government agencies are having trouble doing their work has never been of serious concern in American democracy. After all, constitutional arrangements in the United States were not designed to smooth the way for the exercise of power by the instrumentalities of the state. No amount of antibureaucratic rhetoric, however, can obscure the fact that effective national policymaking in the United States, as in other democracies, requires that the elected officials responsible for making policy decisions receive as much help as possible from the permanent organizations of government.<sup>128</sup>

Rourke reminds us that the nation's anxiety about autocratic, distant government is so deeply rooted that the civil service should never harbor the expectation of applause or acceptance.<sup>129</sup> Nevertheless, the erosion of the civil service in recent years is arguably the worst manifestation of public distrust since the difficult transition from patronage to professionalism at the turn of the last century.<sup>130</sup> A series of blue ribbon commissions and analysis by political scientists have concluded that civil servants—especially those that hold mid-level management positions—are beleaguered by hostile congressional oversight, limited positive reinforcement, funding gaps, and disparities in public and private pay scales for those with specialized technical, administrative, and legal expertise.<sup>131</sup> Consider the alarmist tone of the 2003 National Commission on the Public Service, more commonly known as the Volcker Commission because its chairman was Paul Volcker, a former head of the Federal Reserve:

The notion of public service, once a noble calling proudly pursued by the most talented Americans of every generation, draws

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128. Frances E. Rourke, *American Bureaucracy in a Changing Political Setting*, 1 J. PUB. ADMIN. RES. & THEORY 111, 111 (1991).

129. *Id.* at 118–19.

130. For an analysis of this process, see DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY, REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 14–36 (2001).

131. For a more detailed description of these issues, see STEINZOR & SHAPIRO, *supra* note 106, at 192–219.

an indifferent response from today's young people and repels many of the country's leading private citizens. Those with policy responsibility find their decisionmaking frustrated by overlapping jurisdictions, competing special interests, and sluggish administrative response . . . . The best are underpaid; the worst, overpaid. Too many of the most talented leave the public service too early; too many of the least talented stay too long.<sup>132</sup>

According to 2008 estimates by the non-partisan Partnership for the Public Service, the federal government will lose nearly 530,000 employees by 2012, largely because it has a workforce aging far faster than that of the private sector—58% of federal workers are over forty-five, compared with 41% in the private sector.<sup>133</sup> The Partnership projects that 36% of top civil service managers in the Senior Executive Service (SES) will retire by 2012.<sup>134</sup> Similarly, 27% of supervisors who direct daily work throughout the government are expected to retire by 2012.<sup>135</sup> While most of these retirements are motivated by length of service, morale problems are also acute:

Far too many talented public servants are abandoning the middle levels of government . . . either because they are fed up with the constraints of outmoded personnel systems and unmet expectations for advancement or simply lured away by the substantial difference between public and private sector salaries in many areas.<sup>136</sup>

The implications of this “brain drain” are compounded by the fact that downsizing throughout the 1990s reduced the size of the federal workforce by 400,000 jobs, leaving many crucial positions unfilled.<sup>137</sup> Moreover, even these discouraging predictions do not account for the deep budget cuts

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132. NAT'L COMM'N ON THE PUB. SERVICE, URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY, at 1 (2003). Other members of the Volcker Commission included former Comptroller General Charles Bowsher; former Senator Bill Bradley (D-NJ); former Secretary of Defense Frank Carlucci; former Reagan administration Chief of Staff Kenneth Duberstein; former Director of Presidential Personnel Constance Horner; former OMB Director Franklin Raines; Co-Chair of the Millennial Housing Commission Richard Ravitch; former Secretary of the Treasury Robert Rubin; former Secretary of Health and Human Services Donna Shalala; and former Representative Vin Weber (R-MN).

133. *Issue Brief: Brain Drain 2008*, P'SHIP FOR PUB. SERV. (May 5, 2008), <http://www.ourpublicservice.org/OPS/publications/viewcontentdetails.php?id=126>.

134. *Id.*

135. *Id.*

136. NAT'L COMM'N ON THE PUB. SERVICE, *supra* note 132, Error! Bookmark not defined., at 8.

137. *Issue Brief: Brain Drain 2008*, *supra* note 133.

across the government that seem certain to occur as a result of deficit politics in Congress. The loss of experienced managers and attrition in important, lower-level positions could undermine the agencies further, making it difficult to avoid acute dysfunction.

### 5. Capture

Capture, in the traditional sense of the term, is less prominent than early administrative law scholars supposed.<sup>138</sup> Agencies suffer from resource shortfalls, outside political interference, demoralization, and incompetence far more often than they succumb to the corruption of being beholden to only one group of stakeholders. The irony is that some of the remedies thought necessary to defeat capture—extensive judicial review, for example—have caused new problems, including extensive delays in issuing protective regulation.<sup>139</sup> Nevertheless, the most corrosive form of capture clearly affected MMS, as discussed above in the context of the *Deepwater Horizon* disaster.<sup>140</sup> Clearly, capture remains a potential contributing factor to agency dysfunction, especially when regulatory missions are combined with the administration of lucrative leasing agreements for extractive industries.

Why has the Obama administration—and the George H. W. Bush, Clinton, and George W. Bush administrations before it—failed to recognize, much less come to grips with, these blatant symptoms of dysfunction and failure? A primary factor is OIRA, which serves both as the gatekeeper for regulatory proposals to enter the outside world and a distorted window through which the White House looks back at the agencies.

## II. THE HISTORY OF CENTRALIZED REVIEW

Because President Ronald Reagan is widely credited with launching the ongoing campaign against big government, casual observers of the regulatory process assume that the idea of centralized White House review began with his election. In fact, OIRA's antecedents date further back to the same time period in the early 1970s when the protector agencies were first created. This historical detail is crucial to an understanding of how OIRA evolved and why it became ever more powerful.

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138. For a classic discussion of the phenomenon, see PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* (1981).

139. See, e.g., CATHERINE O'NEILL ET AL., *CTR. FOR PROGRESSIVE REFORM, THE HIDDEN HUMAN AND ENVIRONMENTAL COSTS OF DELAY* (2009), available at [http://www.progressivereform.org/articles/CostofDelay\\_907.pdf](http://www.progressivereform.org/articles/CostofDelay_907.pdf); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 *DUKE L.J.* 1385, 1429–36 (1992).

140. DeParle, *supra* note 46.

Environmentalists, organized labor, and consumer advocates played an outside game through much of this history, using public sentiment and the media to amplify pressure on Congress to create the agencies and steadily expand their statutory missions. In the 1990s, such fertile legislative activity for the most part ceased. Regulated industries responded with an inside game, focusing on the White House staff and leveraging the perceived electoral advantages of having business support to impress upon Presidents the need to moderate, as quietly as possible, the public interest community's gains. Over the long run, the inside game appears to have been a far more effective strategy because it has allowed Presidents to have their political cake and eat it too: publicly supporting popular initiatives like environmental protection but placating business interests behind the scenes. Not incidentally, public interest groups put their faith in Congress, an institution that has become increasingly dysfunctional over the years, while business interests hedged their bets with the Presidency, which has become steadily more powerful.

#### A. 1970–1980: “Quality of Life” Reviews

With the notable exception of the FDA,<sup>141</sup> the most important health, safety, and environmental agencies were created in the first flush of progressive idealism and social movements catalyzed by young people's protests against the Vietnam War.<sup>142</sup> The companies subject to this stunning expansion of the regulatory state appeared to have been caught by surprise, and they did not muster any effective opposition to the rapid-fire creation of these new institutions. They recovered quickly, however, and the seeds of centralized White House review controlled by political staff and economic advisers at the highest levels were planted in the early days of the Nixon administration when Maurice Stans, President Nixon's Secretary of Commerce, persuaded chief domestic policy advisor John Ehrlichman to establish a taskforce to oversee EPA's regulatory activities.<sup>143</sup>

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141. The FDA was created in 1906 in response to the fraud that surrounded the marketing of ineffective and even dangerous remedies. Act of June 30, 1906, ch. 3915, 34 Stat. 768, *repealed by* Federal Food, Drug, and Cosmetic Act, ch. 675, § 902(a), 52 Stat. 1040, 1059 (1938); JAMES HARVEY YOUNG, *THE MEDICAL MESSIAHS: A SOCIAL HISTORY OF HEALTH QUACKERY IN TWENTIETH CENTURY AMERICA* 98 (1967).

142. Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), *reprinted in* 5 U.S.C. app. at 643 (2006), *and in* 84 Stat. 2086 (1970) (establishing EPA); Consumer Product Safety Act, Pub. L. No. 92–573, § 4(a), 86 Stat. 1207, 1210 (1972) (codified as amended at 15 U.S.C. § 2053(a) (2006)) (establishing CPSC); Occupational Safety and Health Act of 1970, Pub. L. No. 91–596, 84 Stat. 1590 (codified as amended at 29 U.S.C. § 651 (2006)) (establishing OSHA); Highway Safety Act of 1970, Pub. L. No. 91–605, § 202, 84 Stat. 1714, 1739 (codified as amended at 49 U.S.C. § 105 (2006)) (establishing NHTSA).

143. See Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 *LAW & CONTEMP. PROBS.* 127, 132–33 (1991).



That taskforce, the National Industrial Pollution Control Council (NIPCC), enthusiastically supported so-called “quality of life reviews”<sup>144</sup> to curb EPA’s implementation of the Clean Air Act of 1970.<sup>145</sup> Established by a 1970 executive order, NIPCC included sixty-three corporate executives who were appointed by the Commerce Department Secretary.<sup>146</sup> The NIPCC’s purpose was to give potential regulatory targets an open line to the top levels of government. Although modern regulatory review does not incorporate such blatant efforts to involve business leaders as decision makers, one of the lasting legacies of these early efforts is an unduly solicitous cultivation of industry complaints and opposition to regulatory proposals spearheaded by OIRA, the “court of second resort” for such aggrieved parties.<sup>147</sup>

From their inception, as Professor Robert Percival recounts, quality of life reviews followed a second pattern that remains entrenched in regulatory review as practiced today: the inside game occurs simultaneously with the outside game.<sup>148</sup> William Ruckelshaus, EPA’s first Administrator and, for the time, a committed environmentalist, pleaded his case for particularly controversial rules to the press and to sympathetic members of Congress, including Democratic Senator Edmund Muskie, the presidential candidate who is largely credited with having provoked Nixon into creating EPA by executive order.<sup>149</sup> This outside game was more than matched by regulated industries’ inside game: quality of life reviews behind closed doors where the outcomes of a rulemaking were negotiated by senior administration officials in close collaboration with the NIPCC. Ruckelshaus and his successor, Russell Train, worked hard to put the best face on final EPA decisions that clearly reflected major substantive retreats forced upon them behind the scenes, arguing that OMB, by then the convener of such reviews, did not dictate these outcomes.<sup>150</sup> These protests did not reassure

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144. *Id.* at 130, 135.

145. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7401 (2006)).

146. Exec. Order No. 11,523, 3 C.F.R. 117 (1970); Percival, *supra* note 143, at 130.

147. CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 27 (2009).

148. Percival, *supra* note 143, at 134–38.

149. See Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), reprinted in 5 U.S.C. app. at 643 (2006), and in 84 Stat. 2086 (1970) (establishing EPA). For a compelling description of these events and the dynamic between Democratic presidential candidates and President Nixon, see RICHARD N. L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES* 227–54 (2d ed. 2006).

150. See Robert V. Percival, *Presidential Management of the Administrative State: The Not-so-Unitary Executive*, 51 DUKE L.J. 963, 988–89 (2001).

public interest groups, who accused OMB of allowing regulated industries to negate EPA's best professional judgments.<sup>151</sup>

And so it went throughout the 1970s. President Gerald Ford retained quality of life reviews, inspiring similar controversy on Capitol Hill and among public interest groups.<sup>152</sup> Ford also mandated a precursor of cost-benefit analysis in the form of a requirement that agencies prepare "inflation impact statements" to include discussion of the potential effect of the proposed regulation on industry costs and therefore inflation throughout the economy as a whole.<sup>153</sup> A new office within the White House, the Council on Wage and Price Stability, "was given the responsibility of coordinating agency compliance" with this new requirement.<sup>154</sup> The Council's focus was on economic regulation, as opposed to health, safety, and environmental rules.<sup>155</sup>

Jimmy Carter's inauguration as President in 1977 at first seemed to signal a new day for EPA and other health and safety agencies.<sup>156</sup> The President did not officially repeal quality of life reviews, but the process withered on the vine as newly-appointed EPA administrator John Quarles announced that his staff would no longer participate in those deliberations.<sup>157</sup> But when Carter nominated his old friend Bert Lance to serve as OMB director, it rapidly became clear that a robust process of curbing strong regulatory proposals within the White House would continue.<sup>158</sup> On March 23, 1978, President Carter issued the first executive order to mandate a comprehensive regulatory review program headquartered at OMB.<sup>159</sup> Executive Order 12,044 directed that regulatory proposals should not impose "unnecessary" burdens on the economy and should be issued only after consideration of "meaningful" alternatives.<sup>160</sup> It also required the preparation of a "Regulatory Analysis" to accompany all rulemaking proposals and final rules, as well as a semiannual regulatory agenda containing notice of rules under development.<sup>161</sup>

The most notable characteristic of the new review process was the addition of yet another unusually potent set of players to the process. In addition to the Council on Wage and Price Controls, the Council of

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151. Percival, *supra* note 143, at 136.

152. *Id.* at 138–41.

153. *Id.* at 139. The inflationary impact statement requirement was included in Exec. Order No. 11,821, 3 C.F.R. 926 (1971–1975).

154. Percival, *supra* note 143, at 139.

155. *Id.* at 140.

156. *Id.* at 142.

157. *Id.*

158. *Id.*

159. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

160. *Id.* § 1, 1(d).

161. *Id.* § 2(a), 3.

Economic Advisers, and OMB, the President set up an inter-agency group called the Regulatory Analysis Review Group (RARG), which included representatives of seventeen major federal agencies.<sup>162</sup> RARG's four-member executive committee included representatives from the Council of Economic Advisers and OMB, as well as two rotating members of the larger agency group—one from an “economic agency” and one from a “regulatory agency.” The executive committee was instructed to select some twenty major regulations annually for intensive review.<sup>163</sup>

This process triggered significant controversy despite the fact that it occurred in public and was supposedly designed to encourage the agencies themselves to learn the new methodologies rather than have OMB do this work for them. Among other disputes, the RARG forced then-EPA Administrator Douglas Costle to weaken a crucial standard that would set the acceptable level of ozone (commonly known as smog) in the ambient air.<sup>164</sup> As we shall see, the George W. Bush administration and the Obama administration saw reprises of this episode with the RARG's successor, OIRA, in charge.<sup>165</sup>

From a present-day perspective, however, the most significant feature of the Carter process was that the agencies assigned the mission of preserving environmental quality, eliminating workplace health and safety threats, or drumming defective products out of the marketplace took their place as members of a much larger group, with no special recognition of their statutory mandates or their unique expertise. This aspect of regulatory review, which undermines any internal government deference Congress intended to assign to the protector agencies, is now a deeply entrenched and enormously powerful tool used by White House staff when conducting centralized review of individual rules.

### B. 1980–1992: Executive Orders and Paperwork Review

At the close of the Carter administration, industry champions of deregulation succeeded in getting two statutes passed to impose further

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162. Percival, *supra* note 143, at 144.

163. *Id.*

164. *Id.* at 146. Known as National Ambient Air Quality Standards (NAAQS) and authorized by section 109 of the Clean Air Act, attainment of such limits on smog remains a distant goal in many major American cities. Frequent “Code Red” or “Code Orange” days trigger radio announcements that warn parents not to allow their children to play outside because smog could trigger asthma attacks. *See, e.g., Air Quality Index: Using Air Quality Information to Protect Yourself from Outdoor Air Pollution*, AM. LUNG ASS'N, <http://www.lungusa.org/healthy-air/outdoor/air-quality-index.html> (last visited Aug 7, 2011).

165. *See infra* notes 218–226, 243–253 and accompanying text.

controls on the agencies: the Regulatory Flexibility Act<sup>166</sup> and the Paperwork Reduction Act.<sup>167</sup> The second statute created OIRA. The new unit's statutory mission was limited to reviewing any proposal by a government agency or department to require the completion of additional paperwork by citizens, state or local government, or private sector entities.<sup>168</sup> But OIRA's far more important role in reviewing the substance of regulations was soon fleshed out in a series of executive orders.<sup>169</sup> The first, Executive Order 12,291,<sup>170</sup> issued by President Reagan within one month of taking office, had three distinct mandates:

1. All covered agencies<sup>171</sup> must refrain from taking action unless potential benefits outweigh potential costs.<sup>172</sup> The agencies must also consider regulatory alternatives that involve the lowest net cost.<sup>173</sup>
2. Agencies must prepare a "regulatory impact analysis" (RIA) containing their cost-benefit analysis for each "major" rule, defined to include any proposal that would have an annual effect on the economy of \$100 million or more.<sup>174</sup>
3. Agencies must send a copy of each proposed and final rule to OIRA before it is published in the *Federal Register*.<sup>175</sup> Agencies were instructed to refrain from publishing rules until they had responded to any concerns raised by OIRA staff.<sup>176</sup>

Agencies were required to forward proposed and final rules, along with accompanying RIAs, to OIRA at least sixty days prior to their publication.<sup>177</sup> OIRA would be "deemed to have concluded review" within thirty

166. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-612 (2006)).

167. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended at 44 U.S.C. §§ 3501-3520 (2006)).

168. *Id.* 94 Stat. at 2814-15.

169. See COPELAND, *supra* note 147.

170. Exec. Order No. 12,291, 3 C.F.R. 127 (1982); COPELAND, *supra* note 147, at 3-4.

171. The order—and all subsequent regulatory review orders—exempts independent regulatory agencies, such as the Federal Trade Commission and the Securities and Exchange Commission, but covers all Cabinet departments and free-standing executive branch agencies such as EPA. See Memorandum from Cass R. Sunstein, OIRA Administrator, to the Heads of Independent Regulatory Agencies (July 22, 2011) available at <http://www.whitehouse.gov/sites/default/files/omb/memorandum/2011/m11-28.pdf>.

172. Exec. Order 12,291 § 2(b), 3 C.F.R. at 128.

173. *Id.* § 3(d)(4).

174. *Id.* §§ 1(b)(1), 3(d)(4).

175. *Id.* § 3(c).

176. *Id.* § 3(f)(2).

177. *Id.* § 3(c).

days of submission of a major final rule or rule proposal unless “the Director advises the agency to the contrary,” in essence giving OIRA discretion to extend its review period indefinitely.<sup>178</sup>

In addition to formalizing cost-benefit analysis—notably, without any statutory authority—Executive Order 12,291 is significant because of the dynamic it set up between agency heads and the OIRA Administrator. The order did not go so far as to hand OIRA the power to kill a rule outright, an outcome that arguably would be illegal under EPA’s authorizing statutes, which delegate rulemaking mandates directly to the agency Administrator as opposed to the President.<sup>179</sup> But given the White House’s sway over agency heads, that explicit grant of final authority was unnecessary. Instead, the instruction to consult—and implicitly to satisfy—OIRA’s economists set up an inside game dynamic reminiscent of the NIPCC and now quite entrenched: all disputes would be negotiated behind closed doors at the staff level, no matter how difficult the dispute and how garbled the resulting compromise.

President Reagan’s second and last executive order on regulatory review, Executive Order 12,498, extended OIRA’s power further by requiring covered agencies to submit entire regulatory programs to OIRA on an annual basis, specifying that OIRA had the authority to “return” individual rulemaking proposals to an agency for “reconsideration” if the item had not been included or was “materially different” from what the annual agenda described.<sup>180</sup> This development in effect ratified the idea that OIRA was not merely a passive recipient of whatever ideas the agencies chose to advance, but instead had some responsibility for reviewing the wisdom of their overall regulatory priorities.

Reagan’s expansion of OIRA’s authority and intrusiveness generated controversy in the press and on Capitol Hill. Congress included many strong advocates of environmental and other health and safety protections, including Representatives Henry Waxman (D-CA) and James Florio (D-NJ), both of whom were instrumental in conducting rigorous and unrelenting oversight of OIRA’s activities.<sup>181</sup> In 1983, Congress allowed the appropriation for OIRA’s regulatory review activities to expire, but the unit

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178. *Id.* § 3(e).

179. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1361(a) (2006); Clean Air Act, 42 U.S.C. § 7601(a)(1) (2006).

180. Exec. Order No. 12,498 §§ 1, 3, 3 C.F.R. 323, 323, 325 (1986).

181. For a vivid description of these events, see David Osborne, *State of Siege: Can Democrats Mastermind the Great Escape?*, MOTHER JONES, Feb./Mar. 1982, at 22, 22–31. I worked for Representative Florio at that time as staff counsel to the Subcommittee on Commerce, Transportation, and Tourism of the House Energy and Commerce Committee that he chaired, and they worked closely with Representative Waxman’s Subcommittee on Health.

continued to receive funding for its work under the Paperwork Reduction Act through its mother institution, OMB.<sup>182</sup> OIRA was reauthorized in 1986 by a law that made its director subject to Senate confirmation, thereby giving Congress leverage over its leadership, at least initially.<sup>183</sup> But, perhaps most remarkably, in 1985 five House committee chairmen filed a friend-of-the-court brief supporting a lawsuit brought by the Public Citizen Litigation Group against OSHA, which had refused to regulate ethylene oxide in the workplace, reportedly at OIRA's behest.<sup>184</sup> Members of Congress very rarely participate in judicial proceedings, making this episode a telling expression of their restlessness over OIRA's deregulatory efforts in a decidedly divided government.

As Reagan's Vice President, George H.W. Bush served as the chair of a cabinet-level "Task Force on Regulatory Relief," a self-styled forum of last resort for industries that could not convince agencies to acquiesce to their demands.<sup>185</sup> The Task Force assembled a "hit list" of suspect regulations nominated by industry.<sup>186</sup> When he became President, the elder Bush toned down his position, at least with respect to natural resource issues, declaring himself the "environmental president" and supporting passage of the 1990 Clean Air Act Amendments, the most ambitious environmental statute ever passed.<sup>187</sup> His overall record as President was a moderate one, partially eclipsing his role as deregulatory point person.<sup>188</sup>

Professor Percival notes that the elder President Bush once exclaimed that he could not understand why he could not simply mandate that agencies act in a certain way, despite their detailed statutory mandates, having them "salute smartly and go execute whatever decision I make."<sup>189</sup> Despite this confusion about the scope of presidential authority when Congress has conferred non-discretionary mandates on agencies, his presidency is not known for using OIRA to aggressively monitor and change industry behavior.

### C. 1992–2000: "Collegial" Review

The election of William Jefferson Clinton assuaged congressional Democrats' fears about OIRA's influence on health, safety, and environmental

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182. COPELAND, *supra* note 147, at 7.

183. *Id.*

184. *Id.* For a fuller description of the battle to regulate ethylene oxide, see David C. Vladeck, *Unreasonable Delay, Unreasonable Intervention: The Battle to Force Regulation of Ethylene Oxide*, in ADMINISTRATIVE LAW STORIES 190 (Peter L. Strauss ed., 2006).

185. See Percival, *supra* note 143, at 148.

186. *Id.*

187. ANDREWS, *supra* note 149, at 331.

188. See *id.*

189. Percival, *supra* note 150, at 995.

regulation to some extent, and, to reassure these critics, the new administration wasted no time putting its own stamp on the process, issuing Executive Order 12,866 to replace 12,291 and 12,498 in September 1993.<sup>190</sup> Although the Clinton approach preserved OIRA's authority to consult with respect to "significant" rules (those that would impose economic effects over \$100 million annually or "adversely affect" the economy "in a material way"), it imposed some important constraints on the process.<sup>191</sup> OIRA was given a series of mandatory deadlines for the conclusion of review, with the review period limited to ninety days following submission of the rule by an agency or department, although that deadline was subject to one possible extension of thirty days if the extension was approved in writing by the OIRA Administrator and the head of the agency responsible for the rule requested the extension.<sup>192</sup> As significantly, Executive Order 12,866 required that after a regulatory action was published in the *Federal Register*, or after an agency or department had announced its decision not to pursue the regulatory action, OIRA "shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section."<sup>193</sup> These before-and-after documents would reveal the extent and nature of the changes OIRA demanded from the agencies. Last but not least, although the Clinton order required agencies to conduct, and OIRA to review, cost-benefit analyses, the ultimate standard for acceptance of a rule was whether benefits "justified" costs, a formula perceived as significantly more flexible than the Reagan requirement that benefits "outweigh" costs.<sup>194</sup> These reforms were useful, but they did not eliminate OIRA's gatekeeper authority.

President Clinton continued the use of cost-benefit analysis in order to demonstrate his commitment to reining in "big government," thereby shoring up his credentials as a new and different type of Democrat.<sup>195</sup> During the Clinton administration, OIRA's intervention in rulemaking was less aggressive and destructive than before. For example, the number of rules reviewed by OIRA dropped precipitously from an average of 2,400 annually under the Reagan and Bush executive orders to an annual average of 615 during President Clinton's two terms.<sup>196</sup> But the infrastructure remained available for a resurgence of a far more intrusive strain of centralized review. Clinton legitimized this structure, doing as much to establish

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190. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

191. *Id.* § 3(f)(1) (defining "significant regulatory action"); *id.* § 6(b)(1) ("OIRA may review only actions identified by the agency or by OIRA as significant . . .").

192. Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. 638, 646-47 (1994).

193. *Id.* § 6(b)(4)(D).

194. COPELAND, *supra* note 147, at 9.

195. STEINZOR & SHAPIRO, *supra* note 106, at 92.

196. COPELAND, *supra* note 147, at 10.

OIRA's hegemony as arbiter of health, safety, and environmental policy as the concerted efforts of the preceding twelve years of Republican presidencies.

Because previous critiques of centralized regulatory review were fundamentally partisan—that is, liberal Democrats blaming conservative Republicans for hostility to a proactive regulatory state—the decision by the moderate, Democratic Clinton administration to maintain cost-benefit analysis driven regulatory review at the White House radically changed the debate. At the moment Executive Order 12,866 was signed, advocates of the agencies' active and unimpeded pursuit of their core missions were transformed into outliers existing on the left fringe of the mainstream political parties. Cost-benefit analysis was embraced on a bipartisan basis. The most diehard opponents of a robust regulatory state—including self-interested industries and traditional conservatives opposed to the expansion of government—had a home at the center of both parties. And the agencies were pushed into eight more years of learning to justify their judgments through the prism of market failure: only if the market would not correct the harm caused to people or natural resources could regulatory controls be justified.

In retrospect, what is most surprising about this turn of events is that a robust and talented cadre of critics of cost-benefit analysis persisted in attacking this methodology, even as OIRA's role as the court of last resort for regulatory opponents became established as an institutional fixture of regulatory affairs.<sup>197</sup> But by the end of the George W. Bush administration, the details of cost-benefit methodology were far less important than the use of OIRA as the forum-of-choice for regulatory review, realizing the goals of Nixon's early quality of life reviews to an extent that the originators of that process could not have imagined.

#### *D. 2000–2009: Gatekeeper with Teeth*

George W. Bush took office without acknowledging the political constraints imposed by an extremely close election and was determined to push government policies far to the right. In the regulatory arena, Vice President Richard Cheney rapidly established an atmosphere modeled on the earlier Reagan campaign to sharply curb health, safety, and environmental regulation.<sup>198</sup> John Graham, a well-known and enthusiastic practitioner of cost-benefit analysis, became the OIRA Administrator for the first five

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197. For examples of such criticisms, see ACKERMAN & HEINZERLING, *supra* note 18; MCGARITY, *supra* note 18, at 142–64; Parker, *supra* note 18, at 1357–81.

198. For a vivid example of this aspect of the Cheney era, see Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1.



years of the administration's two terms.<sup>199</sup> In a stroke of political brilliance, the new President retained Executive Order 12,866, throwing his opponents off balance, at least initially, by claiming that he was not changing the regulatory review policies embraced by the more liberal Clinton administration. A reasonable guess is that Graham advised the President that the infrastructure created by the Clinton order was flexible enough to permit an enthusiastic revival of OIRA's interference in agency rulemaking. In October 2002, Graham said:

[T]he changes we are making at OMB in pursuit of smarter regulation are not headline grabbers: No far-reaching legislative initiatives, no rhetoric-laden executive orders, and no campaigns of regulatory relief. Yet we are making some changes that we believe will have a long-lasting impact on the regulatory state.<sup>200</sup>

Curtis Copeland, the Congressional Research Service's veteran expert on regulatory review, explains that OIRA returned to a "gatekeeper role," noting that Graham defined his mission as "protect[ing] people from poorly designed rules."<sup>201</sup> Graham's tenure, as well as the two years served by his successor, Susan Dudley, were defined by a sharp increase in the use of "return letters" asking agencies to rethink regulatory proposals and by a determined re-emphasis on economic analysis as the fulcrum for deciding whether rules should live or die.<sup>202</sup>

Graham also revised OIRA's guidance to agencies on how to conduct cost-benefit analysis, imposing, among other requirements, stricter rules regarding the "discounting" of regulatory benefits for rules that would have a beneficial effect on future generations.<sup>203</sup> Discounting refers to the practice of treating a monetized benefit or cost as an investment, with money transferred today worth more than money transferred five years from now. The rationale for discounting is to ensure that a future benefit—for example, a life saved in the fifth year after a regulation goes into effect—is worth only the amount of money that would need to be invested today to accrue the value of that life over the same period, using rates that track long-term

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199. For an account of Graham's tenure at OIRA as he remembers it, see John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 456–80 (2008).

200. COPELAND, *supra* note 147, at 18 (footnote omitted).

201. *Id.* at 19 (internal quotation marks omitted).

202. *Id.* at 19–20.

203. *Compare Economic Analysis of Federal Regulations Under Executive Order 12866*, OFFICE OF MGMT. & BUDGET (Jan. 11, 1996), <http://georgewbush-whitehouse.archives.gov/omb/inforeg/riaguide.html> [hereinafter *Clinton Best Practices Memorandum*], with *Circular A–4*, OFFICE OF MGMT. & BUDGET (Sept. 17, 2003), [http://www.whitehouse.gov/omb/circulars\\_a004\\_a-4/](http://www.whitehouse.gov/omb/circulars_a004_a-4/) [hereinafter *Bush Circular A–4*].

return rates estimated by the Department of Treasury. The Clinton guidance gave agencies discretion on which discount rate to use, while the Bush guidance instructed them to calculate benefits using both a seven and a three percent rate, even in instances where regulatory interventions would achieve benefits far in the future.<sup>204</sup> Longer-term discounting is an especially salient issue today because of the so-called “intergenerational equity” problems caused by climate change. If benefits for our children’s children occur in fifty years, and a relatively high discount rate is used, the monetary value of those benefits in present-day money dwindles to almost nothing.<sup>205</sup> Graham’s OIRA justified this outcome as follows:

Some believe . . . that it is ethically impermissible to discount the utility of future generations. That is, government should treat all generations equally. Even under this approach, it would still be correct to discount future costs and consumption benefits generally (perhaps at a lower rate than for intragenerational analysis), due to the expectation that future generations will be wealthier and thus will value a marginal dollar of benefits or costs by less than those alive today.<sup>206</sup>

In other words, OIRA under Graham took the position that it does not matter if discounting eliminates projections of any benefits for future generations because Americans will be increasingly wealthy and able to afford to remedy the environmental degradation past generations have left behind. The Obama administration has left these instructions in place. Meanwhile, polling conducted in 2006 and again in 2010 demonstrates that a majority of Americans worry constantly about their children’s future quality of life, fearing it will be decidedly less positive than life now.<sup>207</sup>

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204. *Clinton Best Practices Memorandum*, *supra* note 203; *Bush Circular A-4*, *supra* note 203.

205. For an explanation of the problems with cost-benefit analysis, complete with a calculator demonstrating diminishing benefits under discounting, see Frank Ackerman & Lisa Heinzerling, *CPR Perspective: Cost-Benefit Analysis*, CTR. FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/perspCostbenefit.cfm> (last visited Aug. 8, 2011).

206. *Bush Circular A-4*, *supra* note 203. The Obama administration retained *Bush Circular A-4* but applied both a three percent and a five percent discount rate to the social costs of carbon emissions—the cause of climate change. See Frank Ackerman, *EPA and NHTSA Lowball Estimates of Carbon Costs in Proposed Tailpipe Emissions Standard*, CPR BLOG (Dec. 4, 2009), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=5A24178F-D2D0-D3D8-E101B3E5C8155F5B>; see also Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454, 49,677–80 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86, 600, 49 C.F.R. pts. 531, 533, 537–38) (discussing the choice of discount rate).

207. See Rich Miller, *Americans See Children’s Future Dim in Poll as 50% Pessimistic*, BLOOMBERG (Oct. 13, 2010, 12:00 AM), <http://www.bloomberg.com/news/2010-10-13/americans-see-children-s-future-dim-in-poll-as-50-pessimistic.html>; *Once Again, the Future Ain’t What It Used to Be*, PEW RESEARCH CTR. (May 2, 2006), <http://pewresearch.org/>

The other important innovation of the Graham/Dudley era was OIRA's energetic assertion of jurisdiction over science policy. Graham realized that the source of many, if not most, of the rules he disliked arose from decisions made to invoke the "precautionary principle"—that is, the theory that government cannot afford to wait until an airtight scientific case documents the link between toxic chemical exposure and irreversible adverse health effects. The precautionary principle is the backbone of every significant American statute that controls toxic exposures because all those laws instruct agencies to prevent harm, rather than waiting for it to materialize.<sup>208</sup> Indeed, the most compelling statement of the principle as it is embodied in American law was made by Judge James Skelly Wright in upholding EPA's first significant regulatory decision—the elimination of lead from gasoline:

Man's ability to alter his environment has developed far more rapidly than his ability to foresee with certainty the effects of his alterations. It is only recently that we have begun to appreciate the danger posed by unregulated modification of the world around us, and have created watchdog agencies whose task it is to warn us, and protect us . . . . [U]nequipped with crystal balls and unable to read the future, [these agencies] are nonetheless charged with evaluating the effects of unprecedented environmental modifications, often made on a massive scale. Necessarily, they must deal with predictions and uncertainty, with developing evidence, with conflicting evidence, and, sometimes, with little or no evidence at all.<sup>209</sup>

Not satisfied with merely using cost-benefit analysis to combat precaution as his predecessors had done, Graham mounted two forays designed to change the fundamental risk assessment practices used by the agencies, especially EPA. The first involved peer review of scientific studies.<sup>210</sup>

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pubs/311/once-again-the-future-aint-what-it-used-to-be ("The idea that each generation of children will grow up to be better off than the one that preceded it has always been a part of the American dream. But barely a third of adults expect things to work out that way for today's children, according to a new Pew Research Center survey.").

208. See, e.g., David Kriebel et al., *The Precautionary Principle in Environmental Science*, 109 ENVTL. HEALTH PERSP. 871, 871–72 (2001). But see Cass R. Sunstein, *The Precautionary Principle as a Basis for Decision Making*, 2 ECONOMISTS' VOICE 1, 2–3, 7 (2005), <http://www.bepress.com/ev/vol2/iss2/art8/> (criticizing the precautionary principle as providing no decision-making guidance).

209. Ethyl Corp. v. EPA, 541 F.2d 1, 6 (D.C. Cir. 1976) (en banc).

210. For an insightful analysis of the implications of the draft guidance policy, see Donald Kennedy, Editorial, *Disclosure and Disinterest*, SCIENCE, Jan. 2, 2004, at 15 (calling the OMB bulletin "over-engineered" and criticizing its assumption that scientists with ties to regulatory agencies should be disqualified from peer review of studies used in rulemaking). Dr. Kennedy is the editor of *Science*, former President of Stanford University (1980–92), and former Administrator of the FDA (1977–79). *Donald Kennedy, PhD*, FREEMAN

Graham's approach would have made it much more difficult for agencies to include federally funded researchers on such panels because they were suspected of harboring pro-regulation biases.<sup>211</sup> The second, even more ambitious proposal focused on how agencies assess the risks posed by toxic chemical exposures, insisting that they consider the overall harm that could be suffered by the general population rather than focusing on the more elevated and alarming risks to vulnerable populations (for example, children, those living with AIDS, or the elderly).<sup>212</sup> Fortunately, both proposals were defeated by a combination of public interest group advocacy and opposition from scientific bodies such as the American Association for the Advancement of Science and the National Research Council.<sup>213</sup>

To his credit, Graham made some significant strides in increasing the transparency of OIRA's activities, posting notices of meetings with outside parties and making return letters available on its website.<sup>214</sup> But OIRA did not fulfill—and still has not fulfilled—the most important transparency mandate established by Executive Order 12,866: publicly disclosing the regulatory proposals sent to OIRA by agencies and the edited versions of those documents following OIRA's review.

Despite the success of the stratagem that preserved Clinton's Executive Order 12,866, President Bush issued Executive Order 13,422 at the tail end of his administration,<sup>215</sup> likely in an effort to further entrench OIRA's power in case a Democrat was elected President. The new order made several changes in regulatory review, including requirements that (1) agencies identify the "market failure" that justifies a regulation (thereby implying that without one, they had no authority to control industrial activities); (2) agencies estimate cumulative regulatory costs and benefits of rules they expect to publish over the next year; and (3) OIRA review extend to "significant guidance documents."<sup>216</sup> This development triggered

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SPOGLI INST. FOR INT'L STUD. STANFORD U., <http://fsi.stanford.edu/people/donaldkennedy> (last visited October 1, 2011).

211. For a critique of this initiative, see Sidney A. Shapiro, *OMB's Dubious Peer Review Procedures*, 34 *Env'tl. L. Rep. (Env'tl. Law Inst.)* 10064, 10068–69 (2004).

212. See Rena Steinzor, *The Legacy of John Graham: Strait-Jacketing Risk Assessment*, RISK POL'Y REP., May 23, 2006. But see James W. Conrad, Jr., *OMB's Draft Bulletin on Risk Assessment: Improving the Process*, RISK POL'Y REP., May 23, 2006 (arguing that the changes advocated by OIRA were long overdue).

213. See, e.g., Cornelia Dean, *Risk-Assessment Plan Is Withdrawn*, N.Y. TIMES, Jan. 12, 2007, at A19; Ralph Lindeman, *OMB Regulatory Policy Chief Anticipates New Draft of Risk Assessment Guidance*, Daily Rep. for Executives (BNA) No. 90, at A-24 (May 10, 2007).

214. COPELAND, *supra* note 147, at 19–21.

215. Exec. Order No. 13,422, 3 C.F.R. 191 (2007). When President Obama took office two years later, among his first acts was the repeal of this order. Executive Order No. 13,497, 3 C.F.R. 218 (2009).

216. Exec. Order No. 13,422 §§ 1(a), 4(c), 7, 3 C.F.R. 191, 191–93 (2007).

another round of criticism that OIRA was overreaching by further expanding its influence over the daily activities of the agencies.<sup>217</sup>

One of the most notable events in OIRA's bureaucratic history occurred in the last weeks of George W. Bush's second term, when a heated confrontation between Susan Dudley (John Graham's successor) and Marcus Peacock (the number two political appointee at EPA) became public.<sup>218</sup> Dudley and Peacock were fighting over an effort to lower the "secondary" standard for ozone pollution that affects crops and plants.<sup>219</sup> EPA had undertaken a long proceeding that included extensive consultations with its statutorily created Clean Air Act Science Advisory Committee (CASAC), and had already disappointed the scientists in setting the "primary" ozone NAAQS to the extent that the Committee sent an extraordinarily strong letter to EPA Administrator Stephen Johnson, warning him, "[I]t is the Committee's consensus scientific opinion that your decision to set the primary ozone standard above this [0.060 to 0.070 parts per million] range fails to satisfy the explicit stipulations of the Clean Air Act that you ensure an adequate margin of safety for all individuals, including sensitive populations."<sup>220</sup> A week before EPA planned to release its final decision on both the primary and secondary NAAQS, Dudley wrote EPA Administrator Stephen Johnson a memorandum explaining that she disagreed with the standard.<sup>221</sup> She argued that EPA should have considered economic values in setting the standard.<sup>222</sup> Peacock responded on behalf of the agency that cost was not a legally permissible criterion under the specific section of the

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217. See, e.g., CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 33862, CHANGES TO THE OMB REGULATORY REVIEW PROCESS BY EXECUTIVE ORDER 13422, at 17–18 (2007); Margaret Kriz, *Thumbing His Nose*, NAT'L J., July 28, 2007, at 32.

218. For a detailed description of this episode, see STEINZOR & SHAPIRO, *supra* note 106, at 205. For a compilation of the key documents telling this story, see *White House Overruled EPA Administrator on Ozone Regulation*, COMM. ON OVERSIGHT & GOV'T REFORM, [http://democrats.oversight.house.gov/index.php?option=com\\_content&view=article&id=3491:white-house-overruled-epa-administrator-on-ozone-regulation&catid=43:investigations](http://democrats.oversight.house.gov/index.php?option=com_content&view=article&id=3491:white-house-overruled-epa-administrator-on-ozone-regulation&catid=43:investigations) (last visited Aug. 9, 2011) [hereinafter *White House Overruled EPA*].

219. Memorandum from Comm. on Oversight and Gov't Reform, Majority Staff, to Members of the Comm. on Oversight and Gov't Reform, (May 20, 2008), *available at* <http://democrats.oversight.house.gov/images/stories/documents/20080520094002.pdf> [hereinafter House Majority Staff Memorandum].

220. Letter from Clean Air Scientific Advisory Comm. to EPA Adm'r Stephen Johnson (Apr. 7, 2008), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/\\$File/EPA-CASAC-08-009-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/$File/EPA-CASAC-08-009-unsigned.pdf). CASAC's original recommendations that the standards be tightened significantly were unanimous. *Id.*

221. Memorandum from Susan E. Dudley to OIRA Adm'r Stephen Johnson (Mar. 6, 2008), *available at* <http://democrats.oversight.house.gov/images/stories/documents/20080520091254.pdf>.

222. *Id.* ("EPA has not considered or evaluated the effects of adopting a W126 [secondary] standard on economic values, personal comfort and well-being, as specifically enumerated in the Act.").

Clean Air Act at stake in the decision.<sup>223</sup> Although the details of how the final decision was made have not surfaced, OIRA's position prevailed, putting the administration in the position of endorsing the view that costs could be considered in establishing NAAQS.<sup>224</sup> Recognizing this reality, Johnson suggested when he announced the revised standard that Congress needed to consider changing the statute to allow future administrators to consider costs.<sup>225</sup> Dr. Rogene Henderson, Chair of CASAC, testified before Congress that, as a result of OIRA's interference, "[w]ilful [sic] ignorance triumphed over sound science."<sup>226</sup>

One other lesson from the ozone confrontation worth emphasizing is that OIRA assumed negative economic effects of the stricter ozone standard, but did not cite a cost-benefit analysis in staking out its position. This omission suggests that while such analyses consume significant time and resources, they may not always be the determinative factor in high-profile regulatory decisions. Another example of this phenomenon is the George W. Bush administration's decision to use a lax, market-based "cap and trade" approach to controlling mercury emissions from power plants.<sup>227</sup> The cost-benefit analysis ultimately compiled to justify the rule, which would have not gone into effect until 2018 and was supported avidly by electric utilities, demonstrated that *costs exceeded benefits* by as much as 448 to 1. Nevertheless, OIRA, supposedly the enforcer of the principle that benefits must exceed costs, cleared the way for the final rule, with a *Federal Register* notice that admitted:

Using these alternate discount rates, the *social costs* of the final rule are estimated to be approximately \$848 million in 2020 when assuming a 3 percent discount rate. These costs become \$896 million in 2020 if one assumes a 7 percent discount rate. . . . As is discussed above, the *total social benefits* that EPA was able to monetize in

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223. Memorandum from Marcus Peacock to Susan Dudley (Mar. 7, 2008), available at <http://democrats.oversight.house.gov/images/stories/documents/20080520091448.pdf>.

224. Matthew L. Wald, *Environmental Agency Tightens Smog Standards*, N.Y. TIMES, March 13, 2008, at A12.

225. See *id.*; Stephen Johnson, Adm'r, EPA, Press Conference Call Regarding National Ozone Standards – Final Rule Announcement (Mar. 12, 2008) (transcript available at <http://yosemite.epa.gov/opa/admpress.nsf/dff15a5d01abdfb1852573590040b7f7/cfbccfab3e93282f8525740a0073a9ba!OpenDocument>).

226. *EPA's New Ozone Standards: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 87 (2008) (statement of Rogene F. Henderson, Chair, Clean Air Scientific Advisory Comm.), available at <http://oversight-archive.waxman.house.gov/documents/20080520141503.pdf>.

227. For more extensive discussion of this sequence of events, see Lisa Heinzerling & Rena Steinzor, *A Perfect Storm: Mercury and the Bush Administration, Part II*, 34 *Env'tl. L. Rep.* (Env'tl. Law Inst.) 10,485, 10,488–91 (2004).

the RIA total \$0.4 million to \$3.0 million using a 3 percent discount rate, and \$0.2 million to \$2.0 million using a 7 percent discount rate.<sup>228</sup>

A coalition of environmental groups and states that planned to enact their own, far more stringent mercury standards ultimately persuaded the U.S. Court of Appeals for the District of Columbia Circuit to overturn the rule, and the Obama administration is now reconsidering it.<sup>229</sup>

### *E. 2009–Present*

#### 1. Business as Usual

By the time Cass Sunstein, a former Harvard Law School professor with a lengthy, eclectic, and provocative publication record, was confirmed as OIRA Administrator in September 2009,<sup>230</sup> troubling signs of acute regulatory failure were present for all to see. This Article focuses on failures in the arena of programs to protect public health, worker safety, and the environment. But what may turn out to be the seminal event for the Obama administration's historical legacy is the failure of the regulatory system designed to police investment practices, which in turn triggered a worldwide economic recession.<sup>231</sup> Neither the President nor Sunstein have ever publicly associated the identical causes of the two sets of problems:

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228. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,642 (May 18, 2005) (emphasis added); see also JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL32868, MERCURY EMISSIONS FROM ELECTRIC POWER PLANTS: AN ANALYSIS OF EPA'S CAP-AND-TRADE REGULATIONS (2006).

229. *New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008). For information on what EPA is doing in response to the opinion, see *Mercury and Air Toxics Standards (MATS) for Power Plants*, EPA, <http://www.epa.gov/airquality/powerplanttoxics/> (last visited Sept. 11, 2011).

230. According to his bibliography on the University of Chicago Law School website, Sunstein is responsible for 424 individual publications, including thirty-two books. See *Cass R. Sunstein: Publications*, U. CHI. L. SCH., <http://www.law.uchicago.edu/node/3552/publications> (last visited Aug. 9, 2011). Largely because of statements made in these extensive writings, Sunstein endured a long, tortured nomination process marked by repeated attacks from conservative Senators who represent ranchers, hunters, and agricultural corporations. See, e.g., Rebecca Adams, *The Costs and Benefits of Cass Sunstein*, CONG. Q. WKLY., Feb. 9, 2009, at 293; David Weigel, *Attacks on Sunstein Frustrate Conservative Fans*, WASH. INDEP. (Sept. 9, 2009, 12:01 AM), <http://washingtonindependent.com/58152/attacks-on-sunstein-frustrate-conservative-fans/>; see also 155 CONG. REC. S7574–75 (daily ed. July 15, 2009) (statement of Sen. Saxby Chambliss).

231. David Leonhardt, *Heading Off the Next Financial Crisis*, N.Y. TIMES MAG., Mar. 28, 2010, at 36–39 (observing that “[f]inance evolved, and Washington did not keep up”).

namely, hollow (or underfunded) government, weak laws, and the collapse of an aggressive enforcement culture.<sup>232</sup>

Sunstein was a friend of the President when both taught at the University of Chicago Law School and an early participant in the Obama campaign.<sup>233</sup> Although his own scholarship has extended significantly beyond regulatory policy to encompass constitutional interpretation and civil rights,<sup>234</sup> Sunstein's positions on regulatory issues are consistently critical of the precautionary principle and supportive of strict cost-benefit analysis.<sup>235</sup> His nomination sent the message that even as the new President appointed aggressive agency heads like EPA Administrator Lisa Jackson, his administration would continue centralized White House review as the ultimate arbiter of regulatory policy.

Somewhere between thirty-five and forty OIRA "desk officers" and "branch chiefs" review approximately seven hundred regulatory matters annually.<sup>236</sup> The disparities between OIRA's scant resources and the more ample, but still inadequate, resources of the health, safety, and environmental agencies make high-profile assertions of its prerogatives essential. If OIRA tried to scrutinize each rule that comes to it for review with any level of intensity, it would soon sink beneath the waves of an impossible workload. Instead, it singles out a handful of rules for special attention, engaging in a kind of deterrence-based oversight that gives agencies strong incentives to anticipate OIRA's objections before they even send a rule over for review.

Sunstein's ambition when he was first nominated in January 2009 was to issue a new executive order revamping 12,866 in order to introduce ideas developed under the rubric of "behavioral economics," a long-time passion

232. See, e.g., DIANA B. HENRIQUES, *THE WIZARD OF LIES: BERNIE MADOFF AND THE DEATH OF TRUST* (2011) (explaining how the weakness of the Securities and Exchange Commission facilitated the operation of the largest Ponzi scheme in history); BETHANY MCLEAN & JOE NOCERA, *ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS* (2010) (discussing the irresponsible mortgage banking that caused the financial crisis and was enabled by a lack of regulation); ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* (2009) (explaining how Wall Street's top executives succeeded in weakening rules that could have prevented the crash of the stock market in 2008 and the subsequent, ongoing economic recession).

233. Cass R. Sunstein, Op-Ed., *The Obama I Know*, CHI. TRIB., Mar. 14, 2008, § 1, at 27 (endorsing Obama).

234. See, e.g., CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

235. See, e.g., SUNSTEIN, *supra* note 11. Despite his suspicion of traditional regulation, Sunstein favors intervention in the marketplace through consumer disclosures that "nudge" people to make decisions in their self-interest. See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (rev. & expanded ed. 2009).

236. COPELAND, *supra* note 147, at 28.



in his academic writing,<sup>237</sup> and President Obama issued a memorandum directing OIRA to undertake such revisions.<sup>238</sup> In an unprecedented move, the White House opened this project to public comment, ultimately receiving 183 separate documents, primarily from industry interest groups.<sup>239</sup> But the process did not produce a new order. Instead, months after the deadline stated in the President's memorandum, Sunstein acknowledged that he would proceed with regulatory review under Executive Order 12,866, the process in effect under the Clinton and George W. Bush administrations.<sup>240</sup>

The track record of OIRA under President Obama is significantly more controversial than its performance under President Clinton, but somewhat less contentious than its performance under President George W. Bush. Unlike Graham, Sunstein has not attempted to issue broad policy statements on sensitive subjects like risk assessment. Yet his OIRA has proved quite intrusive in agency decision making and he has openly boasted about the administration's determination to curb allegedly excessive regulation.<sup>241</sup> Critics have emphasized Sunstein's penchant for derailing or curbing proposals to strengthen protections for workers and the environment.<sup>242</sup>

The two most salient examples of the long-term implications of Sunstein's efforts to craft regulatory policy are OIRA's suppression of EPA's latest efforts to tighten the NAAQS for ozone and its treatment of EPA's proposed coal ash rule. OIRA could not have achieved either result without the support of the President—explicit in the case of ozone and tacit in the case of coal ash. But in a regulatory system that depends on highly detailed statutory mandates to agencies like EPA, the politicization of the rulemaking process through OIRA cannot be dismissed by the facile conclusion that the involvement of the President justifies such outcomes.

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237. See, e.g., *BEHAVIORAL LAW AND ECONOMICS* (Cass R. Sunstein ed. 2000).

238. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5977 (Jan. 30, 2009).

239. Cheryl Bolen, *Revamped Process to Review Agency Regulations Not Imminent*, Daily Rep. for Executives (BNA) No. 46, at C-1 (Mar. 11, 2010); see also *Public Comments on OMB Recommendations for a New Executive Order on Regulatory Review*, OFF. MGMT. & BUDGET, <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp> (last visited Nov. 1, 2010).

240. Bolen, *supra* note 239.

241. Cass Sunstein, *Smarter Regulation*, WHITE HOUSE BLOG (Feb. 7, 2011, 11:29 AM), <http://www.whitehouse.gov/blog/2011/02/07/smarter-regulation>.

242. See, e.g., Dan Froomkin, *Cass Sunstein: The Obama Administration's Ambivalent Regulator*, HUFFINGTON POST (June 13, 2011, 9:51 AM), [http://www.huffingtonpost.com/2011/06/13/cass-sunstein-obama-ambivalent-regulator-czar\\_n\\_874530.html](http://www.huffingtonpost.com/2011/06/13/cass-sunstein-obama-ambivalent-regulator-czar_n_874530.html).

## 2. Ozone Reversal

On September 2, 2011, the Friday morning before a long Labor Day weekend, President Obama issued a statement announcing that he had instructed EPA Administrator Lisa Jackson to suspend efforts to update the NAAQS for ozone.<sup>243</sup> According to the return letter Sunstein sent to Jackson, the President's decision was based on his concern about the "uncertainty" that tougher standards would pose for regulated industries:

Under the Act, finalizing a new standard now is not mandatory and could produce needless uncertainty. The Act explicitly sets out a five-year cycle for review of national ambient air quality standards. The current cycle began in 2008, and EPA shall be compelled to revisit the most recent ozone standards again in 2013. . . . [I]ssuing a final rule in late 2011 would be problematic in view of the fact that a new assessment, and potentially new standards, will be developed in the relatively near future.<sup>244</sup>

The background to this episode of déjà vu over ozone is that in September 2009, Jackson had asked the U.S. Court of Appeals for the District of Columbia Circuit to suspend a lawsuit brought by environmentalists to challenge the George W. Bush-era ozone standards, stating that she was withdrawing them in order to initiate a rulemaking that would develop significantly more stringent limits.<sup>245</sup> But the agency kept delaying this proceeding, signaling the outbreak of another political tug-of-war at the White House.<sup>246</sup>

Because Jackson had suspended what she had labeled a "legally indefensible"<sup>247</sup> standard, the President's decision to order her to stand down until

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243. John M. Broder, *Obama Abandons A Stricter Limit on Air Pollution*, N.Y. TIMES, Sept. 3, 2011, at A1 ("President Obama abandoned a contentious new air pollution rule on Friday, buoying business interests that had lobbied heavily against it, angering environmentalists who called the move a betrayal and unnerving his own top environmental regulators."); Barack Obama, Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards>.

244. Letter from Cass R. Sunstein, Adm'r, OIRA, to Lisa Jackson, Adm'r, EPA (Sept. 2, 2011), available at [http://www.reginfo.gov/public/return/EPA\\_Return\\_Letter\\_9-2-2011.pdf](http://www.reginfo.gov/public/return/EPA_Return_Letter_9-2-2011.pdf).

245. Andrew Childers, *EPA Will Reconsider Air Quality Standards for Ozone Set During the Bush Administration*, 40 Env't Rep. (BNA) 2173 (Sept. 18, 2009). For discussion of the controversy that enveloped the Bush-era ozone rules, see *supra* notes 218–226 and accompanying text.

246. See, e.g., Andrew Childers, *EPA Postpones Ozone Air Standards Until July 2011, Seeks Adviser Recommendations*, 41 Env't Rep. (BNA) 2725 (Dec. 10, 2010).

247. Gabriel Nelson, *Bush Ozone Standards Are 'Not Legally Defensible'—EPA Chief*, N.Y. TIMES (July 14, 2011), <http://www.nytimes.com/gwire/2011/07/14/14greenwire-bush-ozone->

at least 2013 appeared to have left in place a 1997 standard that is substantially weaker than even the Bush-era one.<sup>248</sup> However, Jackson subsequently announced that she was reinstating the Bush standard she had earlier disdained.<sup>249</sup> The Bush standard was 0.075 parts per million (ppm) in the ambient air, while the Obama administration had proposed lowering that number to between 0.060 ppm and 0.070 ppm; the 1997 standard Bush sought to replace was 0.08 ppm.<sup>250</sup> According to EPA estimates, lowering the standard to 0.060 ppm would avoid 4,000 to 12,000 premature deaths, 21,000 hospital and emergency room visits, 111,000 upper and lower respiratory symptoms, 58,000 cases of aggravated asthma, 2.5 million days when individual people miss work or school, and 8.1 million days when individual people must restrict their work or other activities, generating total, monetized benefits in the range of \$35 billion to \$100 billion annually.<sup>251</sup> (These large ranges reflect the difficulty of quantifying future benefits that afflicts all such analyses.)

Again, the Clean Air Act requires EPA to reconsider its NAAQS every five years, consulting with a statutorily created scientific advisory board before setting the final number.<sup>252</sup> Frustrated by the Obama administration's repeated delays, environmentalists and the governments of thirteen states had already announced in August 2011 that they would ask the D.C. Circuit to reinstate their lawsuit against the Bush-era standard,<sup>253</sup> and they appear to have a very good chance of success, given the science advisory board's unanimous advice that EPA revise it to a significantly lower number.<sup>254</sup>

The prospect of a federal appellate court ordering EPA to ignore the President's order underscores the cynicism of White House interference. This distasteful impression is underscored by the fact that even had Jackson

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standards-are-not-legally-defensibl-19743.html ("The standards chosen by the George W. Bush administration to protect people from smog probably wouldn't hold up in court, EPA Administrator Lisa Jackson says in a new letter to a key congressional ally, giving the best indication yet that the agency is planning to set stricter pollution limits this summer.").

248. Andrew Childers & Jessica Coomes, *Enforcement of Ozone Rules Left Uncertain as White House Drops Reconsideration Plans*, 42 Env't Rep. (BNA) 1966 (Sept. 9, 2011) ("The big question we have right now is, 'Will they enforce the 2008 standard or will we be stuck with the 1997 standard?' 'Janice Nolen, assistant vice president for policy and advocacy at the American Lung Association, said.").

249. Jessica Coomes & Andrew Childers, *Jackson Says EPA Required to Implement Bush Administration Standard for Ozone*, 42 Env't Rep. (BNA) 2117 (Sept. 23, 2011).

250. *Id.*

251. EPA, FACT SHEET: SUPPLEMENT TO THE REGULATORY IMPACT ANALYSIS FOR OZONE (2010), available at <http://www.epa.gov/glo/pdfs/fs20100106ria.pdf>.

252. 42 U.S.C. § 7409(d) (2006).

253. Jessica Coomes, *13 States Join Request to D.C. Circuit for Order to Finalize Ozone Standards*, 42 Env't Rep. (BNA) 1861 (Aug. 19, 2011).

254. See *supra* notes 220, 226 and accompanying text.

been allowed to promulgate the more stringent standard, implementation efforts—and therefore the expenditure of private sector compliance costs—would not have gotten underway for several more years, making the President’s invocation of the present economic recession that much more embarrassing.<sup>255</sup>

But perhaps the most enduring implication of OIRA’s role in justifying the ozone delay is the peculiar rationale that regulatory uncertainty justifies postponing statutorily mandated decisions to tighten controls on pollutants. In fact, OIRA had set the stage for this outcome by crafting the new Executive Order, 13,563, signed by the President on January 21, 2011.<sup>256</sup> The order is most notable for its requirement that agencies undertake “retrospective analyses of existing rules,” an activity designed to placate increasingly harsh criticism of the regulatory system by House Republicans.<sup>257</sup> But it apparently had much greater significance for OIRA Administrator Sunstein, who cited it in his return letter to EPA Administrator Jackson, noting that Executive Order 13,563 “emphasizes that our regulatory system ‘must promote predictability and reduce uncertainty’” and asserting that “the President has directed me to continue to work closely with all executive agencies and departments to implement Executive Order 13,563 and to minimize regulatory costs and burdens, particularly in this economically challenging time.”<sup>258</sup> In effect, this elastic and potentially infinite grant of discretion to the President, as represented by OIRA, could justify the suspension of any rulemaking, whether or not any direct, factual link is established between the regulatory proposal and difficulties in achieving an economic recovery. As Professor Daniel Farber has noted, “there’s so much wrong with the ‘uncertainty’ argument that it’s hard to know where to begin,” including the fact that “unemployment is currently lowest in health care, extractive industries and the financial sector—exactly the areas where there has been the most regulatory effort.”<sup>259</sup>

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255. The Clean Air Act delegates to the states the task of developing “State Implementation Plans” to put new NAAQS into effect. 42 U.S.C. § 7410 (2006). These plans take years to develop, and must then be translated into permit limits or other regulatory requirements for pollution sources that emit the pollutants that become ozone. EPA therefore projected that it would take until 2031 for the new standard to be fully implemented by the states. *Fact Sheet: Proposal to Revise the National Ambient Air Quality Standards for Ozone*, EPA, 3, <http://www.epa.gov/glo/pdfs/fs20100106std.pdf> (last visited Sept. 18, 2011). The President’s decision means, of course, that the nation will be compelled to live with the outdated 1997 standard until the late 2030s—or even later—unless a court orders faster EPA action.

256. Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

257. *Id.* at 3,822.

258. Letter from Cass R. Sunstein, *supra* note 244.

259. Daniel Farber, *Ten Fatal Flaws in the “Regulatory Uncertainty” Argument*, CPRBLOG (Sept. 12, 2011), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=5DF93B0F-D47C-D726-57628120754ECD93>.

### 3. The Coal Ash Proposal

As for EPA's coal ash rule, OIRA delayed the proposal for seven months—well beyond the allotted ninety-day review period under Executive Order 12,866—while it rewrote both the rulemaking notice and the regulatory impact statement drafted by EPA.<sup>260</sup> Given the prominence of the rule, the episode reinforced the strong impression left by Sunstein's appointment that the transition from the George W. Bush administration to the Obama administration did not mark a significant change in the most important outcomes of centralized regulatory review of individual rules.

In response to the one-billion-gallon coal ash spill in Kingston, Tennessee, EPA decided that federal regulation would be necessary to eliminate those hazards, forwarding a proposed rule to OIRA in October 2009. That document, referred to here as the "Initial EPA Proposal," would have regulated coal ash as a hazardous waste, emphasizing two justifications for ramping up disposal controls: (1) the migration of toxic constituents of the ash into the environment, especially groundwater, and (2) the recurrence of spills like the one in Kingston.<sup>261</sup>

Regulating coal ash destined for land disposal as a "hazardous waste" under the Resource Conservation and Recovery Act (RCRA)<sup>262</sup> will change industry practices in three ways. First, the operators of coal-fired power plants would be compelled to send the ash to landfills and surface impoundments that comply with more protective design requirements, including the installation of liners, impermeable (rain-proof) covers, and leachate detection systems. Second, EPA would craft those design standards, although state regulators would remain responsible for enforcing

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260. EPA has posted two versions of its draft proposal for regulation concerning the disposal of coal combustion residuals from electric utilities, hazardous substance designation, and reportable quantities of residuals. For the original draft, see *Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Disposal of Coal Combustion Residuals from Electric Utilities and CERCLA Hazardous Substance Designation and Reportable Quantities*, EPA (Oct. 16 2009), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0013> [hereinafter *Initial EPA Proposal*]. The second version includes red-lining incorporated during reviews by and negotiations with OIRA. *Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities*, EPA (May 3, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0012>. The two versions of the draft proposal are available in an online docket of federal regulation material. *Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=EPA-HQ-RCRA-2009-0640> (last visited Aug. 9, 2011) [hereinafter *Docket on Coal Ash*].

261. *Initial EPA Proposal*, *supra* note 260, at 72–76. For a description of the coal ash spill, see *supra* Part I.B.4.

262. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921–6939f (2006 & Supp. II 2008).

individual facility permits in most places. Finally, federal or state regulators would supervise the closure of coal ash dump sites that no longer qualify for disposal because they lack these protective features.<sup>263</sup>

EPA estimates that approximately 495 electric plants generated 136 million tons of ash in 2008.<sup>264</sup> Utilities disposed of about 34% (46 million tons) in so-called “dry” landfills that cover deposits so that rainfall cannot infiltrate them; around 22% (29.4 million tons) went into surface impoundments like the one at Kingston; some 37% (50.1 million tons) was “beneficially reused”; and nearly 8% went into the shafts of abandoned coal mines.<sup>265</sup>

The “beneficial” reuses that consume 50.1 million tons of coal ash annually include everything from applying the ash to agriculture lands, using it in concrete, placing it in road beds before concrete is poured, and using it as a filler material for wall board.<sup>266</sup> In theory at least, recycling practices that reuse coal ash safely have significant social benefits, not only because they avoid disposal of the waste in dumpsites that could leak or collapse, but because they make unnecessary the consumption of virgin materials that require expensive processing before they are used. Unfortunately, EPA has not yet reached the question of what kinds of recycling options are truly “beneficial” for human health and the environment. Instead, the agency has sidestepped this question in both its initial proposal and in the proposal that emerged from OIRA’s review by deciding that whenever a utility claims to be reusing coal ash, such practices would be exempt from any further regulation under RCRA.<sup>267</sup>

In May 2010, a fundamentally changed proposal emerged from OIRA. Rather than sticking with a single proposal, the rulemaking notice advanced three alternatives: (1) adopting EPA’s original option that coal ash be regulated as a RCRA Subtitle C hazardous waste;<sup>268</sup> (2) shifting back to an approach that would treat coal ash as a “solid” waste under RCRA Subtitle

263. Comments from Ctr. for Progressive Reform on Proposed Rulemaking on Disposal of Coal Combustion Residuals from Electric Utilities 3 (Nov. 19, 2010), [http://www.progressivereform.org/articles/Coal\\_Ash\\_Comments\\_Steinzor\\_111910.pdf](http://www.progressivereform.org/articles/Coal_Ash_Comments_Steinzor_111910.pdf).

264. Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. 35,128, 35,151 (proposed June 21, 2010) (to be codified in scattered parts of 40 C.F.R.).

265. *Id.*

266. For an industry perspective, see AM. COAL COUNCIL, COAL ASH: AN ENVIRONMENTAL WINDFALL (2010), *available at* [http://www.americancoalcouncil.org/associations/10586/files/coal\\_ash\\_env\\_econ\\_windfall.pdf](http://www.americancoalcouncil.org/associations/10586/files/coal_ash_env_econ_windfall.pdf); AM. COAL COUNCIL, COAL ASH: BENEFICIAL REUSE (2010), *available at* [http://www.americancoalcouncil.org/associations/10586/files/coal\\_ash\\_beneficial\\_resource.pdf](http://www.americancoalcouncil.org/associations/10586/files/coal_ash_beneficial_resource.pdf).

267. Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. at 35,128.

268. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921–6939f (2006 & Supp. II 2008).

D<sup>269</sup> when it is disposed on land, essentially leaving all regulatory decisions and enforcement to state discretion; and (3) implementing a so-called “D prime” option that would allow all existing coal ash disposal landfills and surface impoundments to continue to function without change for the remainder of their useful life.<sup>270</sup> This transformation of a strongly protective proposal into an equivocal offering of alternatives, two of which would not significantly alter the status quo, offers a disturbing picture of how OIRA operates on both procedural and substantive grounds. The coal ash episode, which remains unresolved, demonstrates a review process and an institution that has not changed either its orientation or outcomes during the four decades of its existence.

### Procedural Issues: Dominance by Industry and Hostile “Sister” Agencies

Although the original EPA coal ash proposal was never made public (as far as I can tell),<sup>271</sup> rumors about its content generated an intense industry lobbying campaign before OIRA. The OIRA staff sat through forty-seven separate meetings with organizational representatives interested in the EPA proposal.<sup>272</sup> Approximately two-thirds of these meetings were with industry and state representatives opposing the rule and one-third were with representatives of environmental groups supporting the rule.<sup>273</sup> The meetings amounted to *thirty percent* of the 142 meetings that OIRA had held since the advent of the Obama administration, an astonishing percentage because OIRA is responsible for reviewing all the proposed and final rules generated by the vast majority of federal agencies and departments.<sup>274</sup>

The claim that this elaborate, OIRA-run process enhances the fairness of rulemaking is contradicted by the reality that it benefits industrial entities that can afford to field a large cadre of legal and technical experts and lobbyists. A study I conducted with colleagues at the Center for Progressive

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269. *Id.* §§ 6941–6949.

270. The *Federal Register* notice setting forth these options only admits to two alternatives, although it explicitly raises the third, minimally protective proposal, calling it the “[sub]title ‘D prime’” approach. Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. at 35,134.

271. I spoke to virtually every reporter who covered the controversy and every representative of a public interest group who worked on the issue; no one had a copy of the original proposal until it was posted on the EPA docket on May 6, 2010.

272. *Meeting Records*, OFFICE OF MGMT. & BUDGET, [http://www.whitehouse.gov/omb/oira\\_2050\\_meetings/](http://www.whitehouse.gov/omb/oira_2050_meetings/) (last visited Oct. 18, 2010).

273. See James Goodwin, *Eye on OIRA: Coal Ash Meetings Up to 42*, CPR BLOG (Apr. 5, 2010, 11:12 AM), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=CE877002-A1A5-ADAC-34017AC4184F218A>; see also *Meeting Records*, *supra* note 272.

274. Goodwin, *supra* note 273. Again, only independent agencies are exempt from OIRA review. See Exec. Order No. 12,866 § 3(b), 3 C.F.R. 638, 641 (1994).

Reform (CPR) examined each of the 6,194 separate OIRA “reviews” of regulatory proposals and final rules between October 16, 2001, when it first began to post notices of meetings held with outside parties on the internet, and June 1, 2011, when we ended our research.<sup>275</sup> During this roughly ten-year period, OIRA officials met 1,080 times with 5,759 participants.<sup>276</sup> Our analysis showed that 65% of the attendees at these meetings represented industry, about five times the number of people who appeared on behalf of public interest groups.<sup>277</sup> A surprising 442 of the 1,080 meetings involved regulatory matters that originated at EPA even though the agency accounted for only 11% of the matters reviewed by OIRA.<sup>278</sup> According to its own internal figures, OIRA changed 84% of the rules forwarded by EPA, in comparison to a 65% change rate for other agencies.<sup>279</sup>

Controversial rulemaking proposals often generate wide participation throughout the White House. For example, research by Professors Lisa Bressman and Michael Vandenberg found that as many as nineteen offices became involved in OIRA’s reviews during the George H. W. Bush and Clinton administrations.<sup>280</sup> For reasons that are unclear, rather than asking the agencies to submit their own individual comments on a rulemaking, OIRA has taken upon itself the job of holding the pen in these disputes, drafting a set of “inter-agency comments” that are forwarded to the rulemaking agency. At least in theory, a balanced set of comments from other agencies and departments, some favoring strong environmental protections and others opposing it, is consistent with the notice and comment structure established by the Administrative Procedure Act.<sup>281</sup> But in direct contravention of the

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275. RENA STEINZOR ET AL., *CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMP PROTECTION OF PUBLIC HEALTH, WORKER SAFETY AND THE ENVIRONMENT* 5 (2011), available at [http://www.progressivereform.org/articles/OIRA\\_Meetings\\_1111.pdf](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf).

276. *Id.*

277. *Id.* at 8.

278. *Id.* at 9.

279. *Id.*

280. Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 68 (2006). Those offices included:

Chief of Staff, Legislative Affairs, Public Liaison, Intergovernmental Liaison, Press Secretary (including Communications), White House Counsel, Domestic Policy Counsel, National Economic Council, Political Affairs, Office of the Vice President (including the Council on Competitiveness in the [G. H. W. Bush] administration), Office of Policy Development, Office of Management and Budget (other than OIRA), Council of Economic Advisors, Council on Environmental Quality, Office of the United States Trade Representative, Office of Science and Technology Policy, and the National Security Council.

*Id.* at 64 n.107.

281. Administrative Procedure Act, 5 U.S.C. §§ 553(a)–553(b) (2006).



instructions contained in Executive Order 12,866,<sup>282</sup> OIRA follows a strict policy of keeping inter-agency comments confidential. Indeed, release of inter-agency comments in the coal ash rulemaking occurred only because EPA decided on its own to post them on the web, immediately triggering a behind-closed-doors dispute within the Obama administration. The comments were briefly removed from the site, then rapidly re-posted within a few hours, accompanied by the following notice:

The below document was posted on this public site in error by EPA. Interagency comments on draft rules by federal agencies under Executive Order 12866 remain confidential to protect the integrity of the deliberative process. Because this document was inadvertently disclosed, EPA has decided, in this instance and with the agreement of the agencies, to allow the document to remain in the docket.<sup>283</sup>

One additional reality underscores the negative implications of OIRA's approach to inter-agency comments. Because Congress has decreed that all of the major pollution control statutes apply equally to entities operated by the United States,<sup>284</sup> EPA's proposals often affect the activities and budget expenditures of federal actors.<sup>285</sup> Giving federal agencies and departments an inside, confidential track on influencing rulemakings creates a fundamental conflict of interest.

This troubling state of affairs was on full display during the coal ash rulemaking. The Tennessee Valley Authority, the federal power company responsible for the Kingston spill, was treated as a confidential federal partner by OIRA, as were the Department of Transportation, a builder of highways using recycled coal ash, and the Department of Energy, which is

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282. Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. 638, 648 (1994), *reprinted in* 5 U.S.C. § 601 (2010) (stating that, following the completion of its review and publication of a rule in the *Federal Register* or when the rule is "otherwise issued to the public," OIRA "shall make available to the public all documents exchanged between OIRA and the agency" during its review).

283. *Interagency Working Comments on Draft Rule Under EO 12866*, EPA, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0350> (last visited Aug. 25, 2011) [hereinafter *Interagency Comments on Draft EPA Coal Ash Rule*].

284. Clean Water Act § 502(5), 33 U.S.C. § 1362(5) (2006); Resource Conservation and Recovery Act § 1004(15), 42 U.S.C. § 6903(15) (2006); Clean Air Act § 302(e), 42 U.S.C. § 7602(e) (2006).

285. See, e.g., Christopher Gozdor et al., *Where the Streets Have No Name: The Collision of Environmental Law and Information Policy in the Age of Terrorism*, 33 *Env'tl. L. Rep. (Env'tl. Law Inst.)* 10,978 (2003); Kyle E. McSarrow, *The Department of Defense Environmental Cleanup Program: Application of State Standards to Federal Facilities After SARA*, 17 *Env'tl. L. Rep. (Env'tl. Law Inst.)* 10,120 (1987).

often allied with electric utilities.<sup>286</sup> In the end, federal opponents of the coal ash proposal took on the features of a posse in a classic western, riding to support the OIRA sheriff's pursuit of the outlaw EPA.

### Substantive Issues: The Stigma Effect

When EPA sent its draft rulemaking proposal to OIRA for review, the documentation included a Draft Regulatory Impact Analysis (Draft RIA) totaling about 165 pages;<sup>287</sup> by the time the proposal emerged, this analysis had grown to 242 pages and predicted that the *negative* benefits of EPA's preferred option could outweigh its *positive* social value by hundreds of billions of dollars.<sup>288</sup> The central methodology introduced to produce this dramatic set of numbers is a peculiar application of behavioral economics.

Industry opponents argue that the strong EPA Subtitle C proposal would create a "stigma effect" that would ruin the recycling market because consumers of the recycled ash would be too frightened to keep buying the material if it would be treated as hazardous when it was *not* recycled but instead dumped into a pit in the ground.<sup>289</sup> This fear would be inspired by the possible threat of a lawsuit at some point in the future when, for example, someone discovered that coal ash had been laid in the foundation of a highway, mixed with concrete, or used as filler in wallboard. Because industry representatives definitely do *not* concede that coal ash is in fact hazardous to public health or the environment, this anticipated litigation presumably would fail when plaintiffs could not prove that the ash had caused them any harm. Regardless, the fear itself would be enough to destroy the beneficial reuse market even if no lawsuit was ever won.<sup>290</sup> Consequently, electric utilities would incur two new expenses: the fees imposed for significantly more expensive disposal alternatives and the costs

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286. See *Interagency Comments on Draft EPA Coal Ash Rule*, *supra* note 283, at 1 (noting that these entities were contributors to the confidential process of commenting on draft rules).

287. MARK EADS, EPA, OMB REVIEW DRAFT: REGULATORY IMPACT ANALYSIS FOR EPA'S PROPOSED REGULATION OF COAL COMBUSTION RESIDUES GENERATED BY THE ELECTRIC UTILITY INDUSTRY (2009), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0010>.

288. See EPA, REGULATORY IMPACT ANALYSIS FOR EPA'S PROPOSED RCRA REGULATION OF COAL COMBUSTION RESIDUES (CCR) GENERATED BY THE ELECTRIC UTILITY INDUSTRY 10-12 (2010) [hereinafter FINAL DRAFT RIA], *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0003>.

289. *Cf.* FINAL DRAFT RIA, *supra* note 288, at 8 (noting that although EPA received many stakeholder letters alleging a market stigma, EPA does not believe on the basis of its past experience with hazardous waste regulations that market stigma will occur).

290. This assertion further depends on the idea that plaintiffs' lawyers routinely file losing lawsuits in the hope of a nuisance settlement; this is also a questionable assertion, but one that is beyond the scope of this Article.

of virgin materials needed to replace the coal ash that was previously used in such applications.<sup>291</sup> OIRA's quantification of these hypothetical costs in the Final Draft RIA ran to \$233.5 billion in negative, or lost, economic and environmental benefits at the high end of a range of estimates.<sup>292</sup> The OIRA economists assumed that if the strict EPA rule went into effect, approximately fifty-one percent of coal ash that is now recycled—some 37 million tons—would be diverted to disposal in 2012, growing to about 41 million tons annually by 2061.<sup>293</sup> The assumption that the stigma effect would reduce the total amount of beneficial use by fifty percent was a “reasonable approximation in the absence [sic] of information to the contrary”<sup>294</sup>—or, in other words, the number is based on an assumption that cannot be disproved.

The Final Draft RIA admits that academic studies of stigma rarely produce such dramatic effects but does not cite examples of such research.<sup>295</sup> Curious about the absence of citations, I traced the concept back to the behavioral science literature,<sup>296</sup> which includes a series of interesting studies that define stigma as people's revulsion against substances or practices that could prove harmful to their health.<sup>297</sup> In one famous experiment, research subjects were asked to drink juice after a “sterilized” cockroach had been dipped in the filled glass; most refused all such requests.<sup>298</sup> Behavioral scientists have also studied reactions to polychlorinated biphenyls in milk, the ramifications of mad cow disease for the British beef industry, and the impact of the 1982 Tylenol tampering incident on future sales, all providing similar results: the average person exhibits revulsion over the

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291. FINAL DRAFT RIA, *supra* note 288, at 174, 177. The results of OIRA's number crunching are summarized in the Appendix *infra*.

292. FINAL DRAFT RIA, *supra* note 288, at 11 exhibit 6, 187–88 Exhibit 5C-21.

293. Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. 35,128 (proposed June 21, 2010) (to be codified in scattered parts of 40 C.F.R.).

294. EPA, APPENDIX FOR REGULATORY IMPACT ANALYSIS FOR EPA'S PROPOSED RCRA REGULATION OF COAL COMBUSTION RESIDUES (CCR) GENERATED BY THE ELECTRIC UTILITY INDUSTRY 333 n.2 (2010), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0003>. This appendix to the final draft analysis may also be accessed through *Docket on Coal Ash*, *supra* note 260.

295. FINAL DRAFT RIA, *supra* note 288, at 176 n.158.

296. The best overall “reader” on the subject is RISK, MEDIA AND STIGMA: UNDERSTANDING PUBLIC CHALLENGES TO MODERN SCIENCE AND TECHNOLOGY (James Flynn et al. eds., 2001) [hereinafter RISK AND STIGMA].

297. See, e.g., Baruch Fischhoff, *Defining Stigma*, in RISK AND STIGMA, *supra* note 296, at 361, 361 (defining stigma as the “refusal to engage in an act that would otherwise be acceptable”); Robin Gregory et al., *Technological Stigma*, in RISK AND STIGMA, *supra* note 296, at 3, 19 (defining stigma as something “different, deviant, flawed or undesirable”).

298. Paul Rozin, *Technological Stigma: Some Perspectives from the Study of Contagion*, in RISK AND STIGMA, *supra* note 296, at 31, 31–33.

contamination and is anxious to avoid exposure.<sup>299</sup> What is interesting and important about this literature, though, are the conclusions the researchers reach about the best solutions to stigma. They recommend confronting the threat with public education, efforts to restore trust in government, and—ultimately—more protective regulation.<sup>300</sup> In other words, the behavioral science literature—as opposed to the behavioral economics literature—focuses on average consumers’ response to risks beyond their control, as opposed to sophisticated industry executives’ feigned reactions to risks that are well within their control.

The coal ash proposal marks the first time that an industry’s fear of liability is not only quantified but central to the formulation of an environmental rulemaking proposal.<sup>301</sup> Should OIRA continue this effort to apply behavioral economics more widely, the inevitable result will be weaker—and fewer—rules.

EPA’s comment period on its coal ash proposal closed on November 19, 2010. The agency is now in the throes of analyzing the thousands of pages of information, complaints, opinions, objections, exhortations, and threats of dire consequences that pack its Internet-based docket.<sup>302</sup> Even if EPA decides to stay the course and support its original proposal, it must endure another round of OIRA’s scrutiny. And it must overcome the use of behavioral economics to produce a crunching of numbers that heavily skews the outcome of the rulemaking toward the weaker regulatory alternatives. EPA Administrator Jackson told a House of Representatives appropriations

299. Michael R. Edelstein, *Crying over Spoiled Milk: Contamination, Visibility, and Expectation in Environmental Stigma*, in RISK AND STIGMA, *supra* note 296, at 41, 41–68; Douglas Powell, *Mad Cow Disease and the Stigmatization of British Beef*, in RISK AND STIGMA, *supra* note 296, at 219, 219–28; Mark L. Mitchell, *The Impact of External Parties on Brand-Name Capital: The 1982 Tylenol Poisonings and Subsequent Cases*, in RISK AND STIGMA, *supra* note 296, at 203, 203–17.

300. Gregory et al., *supra* note 297, at 3, 7; Howard Kunreuther & Paul Slovic, *Coping with Stigma: Challenges and Opportunities*, in RISK AND STIGMA, *supra* note 296, at 331, 341; Paul Slovic et al., *Perceived Risk, Stigma, and Potential Economic Impacts of a High-Level Nuclear Waste Repository in Nevada*, in RISK AND STIGMA, *supra* note 296, at 87, 105.

301. Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. 35,128, 35,186 (proposed June 21, 2010) (to be codified at scattered parts of 40 C.F.R.) (“Beneficially used CCRs are the same material as that which would be considered hazardous; this asymmetry increases confusion and the probability of lawsuits, however, unwarranted . . .”).

302. As of August 25, 2011, the docket contains 11,843 separate documents. The pages listing their titles number 1,185. *Docket Folder Summary for Docket EPA-HQ-RCRA-2009-06-40*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=EPA-HQ-RCRA-2009-0640> (last visited August 25, 2011).

subcommittee that the agency will not issue a final rule regulating coal ash in 2011.<sup>303</sup>

### III. THE IMPLICATIONS OF CENTRALIZED REVIEW

#### *A. One-way Ratchet*

The forty-year history of centralized White House regulatory review—from its genesis in the Nixon White House to its institutionalization during the Reagan administration and OIRA's continued operation during four subsequent administrations—presents compelling evidence that OIRA operates as a one-way ratchet toward weaker rules.<sup>304</sup> This identity is confirmed by the obvious trust that industry representatives exhibit in OIRA's capacity to protect their interests.<sup>305</sup>

It would be a remarkable set of circumstances indeed if such a powerful office developed a deregulatory reputation, its leadership and alumni felt they were being unfairly accused, and everyone neglected to correct the public record. One former OIRA Administrator has undertaken this challenge, doing his best to portray OIRA's role as neutral and arguing that at times, it weakens rules, but at other times, it supports stronger regulation. In an article entitled *Saving Lives Through Administrative Law and Economics*, John Graham cites three instances of what he describes as “lifesaving regulation” that OIRA “advocated” between 2001–06 while he served as its Administrator.<sup>306</sup> These examples do not stand up to scrutiny and, in any event, represent an exceedingly small universe of OIRA's interventions.

The first is the reduction of diesel exhaust.<sup>307</sup> OIRA under Graham solicited comments from industry and conservative groups on which regulations that had emerged from the Clinton administration should be re-evaluated by President George W. Bush.<sup>308</sup> The Mercatus Center, a right-wing think tank headquartered at George Mason University, complained about EPA's fairly strong rule requiring reductions from diesel engines used on-road in, for example, long-haul trucks. But OIRA disagreed, concluding that, because the benefits exceeded the costs by a ratio of sixteen to one, it would support EPA.<sup>309</sup> This enthusiasm for diesel engine reductions, Graham explains, extended to a joint EPA/OIRA effort to draft new rules

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303. Avery Fellow, *Jackson Says EPA Will Not Issue Final Regulation on Coal Ash in 2011*, 42 *Env't Rep. (BNA)* 493 (Mar. 11, 2011).

304. *See supra* Part II.

305. *See supra* notes 275–279 and accompanying text.

306. Graham, *supra* note 199, at 465–80.

307. *Id.* at 466–69.

308. *Id.* at 467.

309. *Id.*

on emissions reductions in off-road vehicles used in agriculture, construction, and mining.<sup>310</sup> Quite apart from the strangeness of the claim that it was a victory for the environment and public to have EPA partnering with OIRA on a rule that EPA had full authority to undertake on its own, Graham fails to report that the rule was delayed when OIRA forced EPA to undertake an elaborate cost-benefit analysis to justify it.<sup>311</sup>

Graham's second example involves OIRA's role in helping to craft the George W. Bush administration's "Clear Skies" proposal outlining legislation to amend the Clean Air Act.<sup>312</sup> Left out of his analysis is the political reality that the Clear Skies proposal was widely viewed as weakening the Clean Air Act's existing requirements and was dismissed by Democratic congressional leaders and environmentalists.<sup>313</sup> When it became obvious that Clear Skies was off the congressional agenda, EPA was compelled to fulfill its existing statutory mandate by crafting a new rule to diminish sulfur and nitrogen oxide emissions from power plants; Graham counts OIRA's "clearing" of this rule as proof that it sometimes supports affirmative regulation.<sup>314</sup> Acquiescing to an expert agency's interpretation of a statutory mandate should be routine at OIRA. Claiming it as a notable, positive event actually confirms the suspicion that OIRA's usual practice is to view any EPA rule, regardless of statutory origin, with suspicion.

Graham's final example concerns vehicle fuel efficiency standards. A loophole in the original standards exempting "light trucks" from fuel-efficiency requirements was the genesis of the sports utility vehicle: manufacturers simply took light truck beds and lowered passenger compartments onto them without redesigning the vehicle as a whole.<sup>315</sup> The result was a vehicle that was exempt from fuel-efficiency standards, with a relatively narrow and elevated wheel base and a top-heavy passenger space that caused it to be susceptible to rollovers. Tired of waiting for federal regulators to plug the light truck loophole, the State of California announced that it would take advantage of its authority under the Clean Air Act to issue a

310. *Id.* at 468.

311. Mike Ferullo, *Reports from Environmental Groups Pan Bush Administration's Regulatory Decisions*, 33 *Env't. Rep. (BNA)* 249 (Feb. 1, 2002) ("Rules sent back to EPA for 'improved analysis' include a proposal for first-time emission limits on snowmobiles, recreational boats, and other nonroad vehicles . . ."); Dean Scott, *Former Administrator Says Bush Administration Threatens EPA Independence*, 35 *Env't. Rep. (BNA)* 911 (Apr. 23, 2004).

312. Graham, *supra* note 199 at 469–74.

313. See, e.g., David Hawkins, Dir., NRDC Climate Ctr., Testimony at the United States Senate Committee on Environment & Public Works, Subcommittee on Clean Air, Climate Change, and Nuclear Safety, Hearings on S. 385, "Clear Skies Act of 2003" (Apr. 8, 2003), available at [http://epw.senate.gov/108th/Hawkins\\_040803.htm](http://epw.senate.gov/108th/Hawkins_040803.htm).

314. Graham, *supra* note 199, at 472.

315. Interview by Frontline with Keith Bradsher, Reporter, N.Y. Times (July 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/rollover/interviews/bradsher.html>.

more stringent fuel-efficiency standard than what the federal government required.<sup>316</sup> Graham's efforts to help other Bush administration officials to out-manuever this threat are the gist of his claim that OIRA was pro-regulation in this context. He does not mention that, had California succeeded, other states would soon have followed suit, and manufacturers would have been compelled to sell more fuel-efficient vehicles nationwide.<sup>317</sup>

Beyond Graham's anecdotal evidence, surprisingly few empirical studies of the effect of OIRA's review on the substance of individual rules are available. The best is one by Professor David Driesen, who undertook a comprehensive review of the scholarly literature and other studies and reports documenting the impact of OIRA's review, concluding that the process routinely slowed and reduced the stringency of environmental, safety, and health regulation.<sup>318</sup> In the empirical portion of his research, Driesen examined twenty-five rules identified by a GAO study as significantly affected by OIRA's review in 2001–02,<sup>319</sup> finding that OIRA's recommended changes reduced regulatory protections with respect to twenty-four of the rules, while the one remaining change was neutral.<sup>320</sup>

Professors Lisa Bressman and Michael Vandenberg interviewed thirty-five top EPA presidential (i.e., Senate-confirmed) appointees: fourteen from the George H.W. Bush administration and twenty-one from the Clinton administration.<sup>321</sup> Their analysis, based on a lengthy survey composed of 107 questions and administered by the authors in person or over the telephone, focused on the nature of White House staff participation in regulatory review.<sup>322</sup> What is especially noteworthy about this survey is that because it involved the perceptions of political appointees—not career civil servants—respondents were significantly more likely to be sympathetic to the president's efforts to control the bureaucracy. On the basis of the survey results, Bressman and Vandenberg concluded that OIRA's review “regularly skews

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316. Graham, *supra* note 199, at 475. California's authority to adopt more stringent requirements is provided by section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a). For an excellent explanation of how these provisions operate, see JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL 34099, CALIFORNIA'S WAIVER REQUEST TO CONTROL GREENHOUSE GASES UNDER THE CLEAN AIR ACT (2007), available at <http://www.bayareanewsgroup.com/multimedia/mn/news/CRSCalWaiver.pdf>.

317. See Susan A. Baird, *EPA Blocks California Car-Pollution Standards*, PROVIDENCE BUS. NEWS (Dec. 20, 2007), <https://www.pbn.com/EPA-blocks-California-car-pollution-standard-,28872>.

318. David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 400–03 (2006).

319. U.S. GEN. ACCOUNTING OFFICE, GAO-01-1163T, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS (2003).

320. Driesen, *supra* note 318, at 365.

321. Bressman & Vandenberg, *supra* note 280, at 62–91.

322. *Id.* at 63–64.

rulemaking in a deregulatory direction” and that OIRA uses “cost-benefit analysis to impose its own normative preference for deregulation.”<sup>323</sup>

Bressman and Vandenberg warn that the haphazard and non-transparent consultations between agency staff and White House officials could undermine the more orderly process followed by the agencies in adopting a rule, including putting proposals out for public comment, analyzing the comments, and modifying the rules accordingly:

It is not a sufficient response to say that the president gets involved in agency decision-making when he wants the public to understand that he is responsible for particular agency policies or rules. Even if such behavior promotes accountability on a limited basis, the concern is that it may not promote rationality in a systematic way, as a model of agency decision-making should.<sup>324</sup>

A third study, conducted by Professor Steven Croley, involved an examination of paper records regarding meetings held by OIRA between 1993 and 2000.<sup>325</sup> Croley characterized the nature of the outside interest groups that met with OIRA staff, but his categories were so expansive that the figures he developed are not very useful. For example, he described all “business firms” and “trade associations” as “narrow” interests and all public interest groups as “broad-based” interests.<sup>326</sup> But if OIRA had several meetings with both types of groups regarding a rule, even if the number of meetings with industry groups far exceeded the meetings with public interest groups, the meetings were coded as a single instance of so-called “pluralistic” meetings.<sup>327</sup> Accordingly, Croley would categorize the forty-seven meetings that OIRA held on the coal ash rule, the overwhelming majority of which involved industry representatives, as a single pluralistic meeting.<sup>328</sup>

Croley then compared the number of rules subject to change by OIRA with the number of meetings held with the different types of groups, concluding that “the White House changed a disproportionately high number of rules that were the subject of meetings only with broad-based groups, though not to a statistically significant extent.”<sup>329</sup> He interpreted this observation as a “finding at odds with any simple picture of White House review according to which the White House delivers regulatory favors to economically powerful interest groups while ignoring broad-based

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323. *Id.* at 50.

324. *Id.* at 70.

325. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003).

326. *Id.* at 853.

327. *Id.*

328. *Meeting Records*, *supra* note 272.

329. Croley, *supra* note 325, at 860.



interests.”<sup>330</sup> In fact, his questionable methodology undermines any such conclusion or, for that matter, any definitive judgment about the substance of OIRA’s interventions in rulemaking over time.

Without seeing the paperwork that agencies like EPA send over to OIRA (“before” documents), and then reviewing the text of the rules and rule proposals that are produced as a result of OIRA’s review (“after” documents), it is difficult to determine with specificity what changes OIRA is responsible for making. In direct violation of the clear instructions contained in section 6(b)(4) of Executive Order 12,866, OIRA does not make “before” and “after” documents available to the public.<sup>331</sup> They only become available if the agency responsible for the rule posts the documents on its website, as EPA did with respect to coal ash.<sup>332</sup> Nevertheless, as Professor Croley’s study illustrates, rates of change in rules and rule proposals that were subject to a significant number of meetings with industry representatives is a rough proxy for the influence of demands that rules be weakened.<sup>333</sup> CPR used this proxy in its more fine-grained analysis of OIRA’s interventions, reaching the same conclusion.<sup>334</sup>

For all of these reasons, any close observer of OIRA’s behavior over time would be hard pressed to assert that it ever takes a consistently neutral approach to the policy choices presented by rulemaking in the arena of health, worker safety, and environmental protection, even under chief executives with a more moderate approach to these issues, such as Presidents Clinton and Obama. Instead, the sheer weight of its history, culture, and professional composition maintain its instinctive hostility toward such protective requirements.

As troubling as OIRA’s historical track record with respect to individual rules may be from a public interest perspective, it is relatively old news. OIRA’s fans justify the phenomenon as a necessary counterweight to

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330. *Id.*

331. That provision requires that after a regulatory action is published in the *Federal Register*, or after an agency or department has announced its decision not to publish or issue this regulatory action, OIRA “shall make available to the public *all* documents *exchanged between OIRA and the agency during the review by OIRA* under this section.” Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. 638, 648 (1994) (emphasis added). The failure to disclose was noted in a letter a group of CPR scholars sent to White House Counsel on March 17, 2010, but we never received a response. See Letter from Bd. of Dirs., Ctr. for Progressive Reform, to Robert Bauer, White House Counsel, The White House (Mar. 17, 2010), [http://www.progressivereform.org/articles/WH\\_Counsel\\_re\\_OIRA\\_March2010.pdf](http://www.progressivereform.org/articles/WH_Counsel_re_OIRA_March2010.pdf).

332. See *supra* notes 287–288 and accompanying text.

333. Croley, *supra* note 325. Very occasionally, industries that make pollution control equipment or other clean technologies might suggest strengthening a rule, but these episodes are sufficiently anomalous as to have no meaningful effect on either Croley’s or CPR’s analyses.

334. See *supra* note 275.

unbridled agency advocacy.<sup>335</sup> I have argued here that OIRA's operation as a one-way ratchet is unacceptable, not least because its activities undermine the clear intent of ambitious, protective statutes in a process that is hidden from the public view. A far preferable way for conservatives to accomplish such changes in a democratic, federalist republic would be to garner the votes to amend these laws. If they cannot, or if Congress is too dysfunctional and polarized to make such lawmaking practical, the least OIRA can do is to be transparent and tread carefully with respect to statutory mandates. Otherwise, as Professor Nina Mendelson points out, the political reasons for certain choices are made less—not more—transparent by OIRA's interventions.<sup>336</sup>

Regardless of how this long-running dialogue plays out in the future, my case for terminating centralized review does not rest solely, or even primarily, on these grounds. If the agencies were up and running, unfettered by political interference and possessing adequate funding to pursue their statutory mandates effectively, the balancing argument might be more convincing. But that relatively healthy state of affairs is a distant memory. Given the widening incidence of agency dysfunction and regulatory failure, the more important and unrecognized implication of regulatory review is the significant lost opportunity costs that OIRA imposes on the American public.

### *B. Lost Opportunity Costs*

Lost opportunity costs are the direct product of OIRA's myopic role as the White House's window on the regulatory world. By squarely occupying the space within the Executive Branch that is concerned with regulatory policy, OIRA forestalls other players from taking the initiative and acting to remedy agency dysfunction. In effect, the White House drives blind with respect to the acute funding shortfalls that threaten the viability of the protector agencies. The President's centralized domestic policy-making staff has never acknowledged that health, safety, and environmental agencies need stronger legal authority, especially with respect to enforcement, to accomplish their missions. When crises like the *Deepwater Horizon* spill erupt, the White House staff and the President are forced to react. But those reactions do not appear to be informed by any comprehensive analysis of why the agencies fail to prevent such catastrophes and, as important, what reforms are needed to ensure that these disasters do not occur again.

OIRA's single-minded focus on individual regulations, and its fierce assertion of the power to oversee the entire regulatory system, also means

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335. See, e.g., DeMuth & Ginsburg, *supra* note 14; Hahn & Litan, *supra* note 14.

336. See Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010).

that the White House has failed to respond to a series of cross-cutting problems that affect several agencies and can only be addressed through affirmative policy-making at the highest levels. So, for example, consistent with its institutional bias, OIRA is preoccupied with ensuring that federal agencies and departments opposed to a regulatory proposal have ample opportunity to condemn it behind closed doors, drafting “inter-agency comments” that are withheld from the public.<sup>337</sup> Recently, it convened an inter-agency group to establish a uniform economic estimate of the social costs of carbon emissions for the purposes of cost-benefit analyses of rules that have a potential impact on climate change.<sup>338</sup> But its recorded history contains no indication that it has ever convened agencies to develop an affirmative proposal that would address industrial practices that harm public health, worker safety, or the environment and that fall within the jurisdiction of more than one agency.

The best contemporary example of a neglected, cross-cutting problem is the growing threat posed by imported consumer products. America and other developed countries have largely exported their manufacturing footprints abroad, especially to China and other developing countries in Southeast Asia. The value of Chinese imports in the U.S. marketplace is estimated to be approximately \$246 billion, about forty percent of the value of total imports. Yet China’s behemoth economy lacks effective regulatory controls at the national level, and the complex supply chains that go into producing a final product create ample economic incentives for adulteration or the use of tainted ingredients.<sup>339</sup> U.S. regulators are overmatched by the scope and size of the problem, and an effective, cross-cutting solution to these circumstances is not even a glimmer on the horizon.<sup>340</sup>

One of the most prominent episodes of food adulteration involved melamine, an industrial chemical used in the manufacture of plastic that causes kidney failure. In 2008, Chinese “milk merchants” added the chemical to raw milk they received from farmers in order to boost the apparent

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337. See *supra* Part II.E.3.

338. Details of the membership of the taskforce and its deliberations were never made public. For a discussion of the merits of its conclusions, see FRANK ACKERMAN & ELIZABETH STANTON, ECONS. FOR EQUITY & ENV’T, THE SOCIAL COST OF CARBON 2–4 (2010), available at [http://realclimateconomics.org/briefs/Ackerman\\_Social\\_Cost\\_of\\_Carbon.pdf](http://realclimateconomics.org/briefs/Ackerman_Social_Cost_of_Carbon.pdf).

339. For a thoughtful analysis of the lack of effective national safety regulation in China and the confounding problem of dangerous imports, see Jacques deLisle, *The Other China Trade Deficit: Export Safety Problems and Responses*, in IMPORT SAFETY, *supra* note 1, at 22, 22–49.

340. See, e.g., Cary Coglianese et al., *Consumer Protection in an Era of Globalization*, in IMPORT SAFETY, *supra* note 1, at 3, 3–21; see also Jyoti Thottam, *The Growing Dangers of the China Trade*, TIME, July 9, 2007, at 29.

protein content of milk products.<sup>341</sup> A small amount of the tainted milk made it into infant formula and candy sold in America.<sup>342</sup> The incident prompted reforms of the Chinese Food and Drug Administration, but, as Professor Richard Suttmeier, an expert on that country's product safety problems, observed to the *Christian Science Monitor*, some 500,000 food producing and processing companies exist in China, making it extraordinarily difficult for the Chinese government—much less the U.S. government—to regulate them effectively.<sup>343</sup>

Another example involves over-sulfated chondroitin sulfate—a chemical with lethal side effects—that was used to mimic the more expensive heparin which is used as a blood thinner for kidney dialysis patients.<sup>344</sup> After American patients exhibited acute, sometimes fatal, allergic reactions, the FDA traced the problem back to its source: two Chinese companies that shipped contaminated heparin to the United States between 2007 and 2008, escaping discovery by their American business partners.<sup>345</sup> Some eighty percent of the active pharmaceutical ingredients used by American drug manufacturers are imported.<sup>346</sup> Congress complained bitterly about the FDA's handling of the heparin incident, especially the limited inspections that the agency was able to conduct at foreign manufacturing facilities.<sup>347</sup> According to a 2009 GAO report placing FDA oversight of drug imports among a small group of “high risk”—or failing—programs government-wide, the agency does not have a firm grip on how many foreign firms actually produce drugs or drug ingredients for the U.S. market and inspects the firms it has identified at a rate of only eight percent annually.<sup>348</sup>

On July 18, 2007, President George W. Bush issued an executive order convening an inter-agency taskforce to study the import problem.<sup>349</sup> But the taskforce spent barely three months on this complex problem, issuing a report in November 2007 that recommended a series of reforms, many of which either required legislative action or the creation of new, unfunded

341. Peter Ford, *Behind Bad Baby Milk, an Ethical Gap in China's Business*, CHRISTIAN SCI. MONITOR, Sept. 17, 2008, at 1 (reporting that the milk merchants had sold the adulterated product to Sanlu, a Chinese state-owned company engaged in a joint venture with a New Zealand dairy cooperative).

342. *Trace Melamine Found in U.S. Baby Formula*, CBS NEWS (Feb. 11, 2009, 1:57 PM), <http://www.cbsnews.com/stories/2008/11/26/world/main4633848.shtml>.

343. *Id.*

344. Favole & Mundy, *supra* note 1.

345. *Id.*

346. Coglianese et al., *Consumer Protection in an Era of Globalization*, in IMPORT SAFETY, *supra* note 1, at 3, 5.

347. *Id.*

348. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-271, HIGH-RISK SERIES: AN UPDATE 16-17, 37 (2009), available at <http://www.gao.gov/new.items/d09271.pdf>.

349. Exec. Order No. 13,439, 3 C.F.R. 227 (2008).

administrative programs that were never pursued by either the Bush or Obama administrations.<sup>350</sup> As an indication of the lack of seriousness of this effort, the cover letter from Michael Leavitt, then Secretary of the Department of Health and Human Services, said that in the three months between the executive order and the report's issuance, "the State Department has led a vigorous international outreach effort to communicate our import safety priorities with our trade partners around the world."<sup>351</sup> In such a short period of time, consultation could not have occurred on more than a cursory level with a small handful of countries.

Ensuring the safety of food, drug, and consumer products imported from developing countries with weak central governments and no effective regulatory infrastructure is an extraordinarily challenging problem. Twelve American agencies share jurisdiction over food safety with sometimes overlapping authority.<sup>352</sup> The United States cannot inspect its way out of this problem. It may not even be able to enforce its way out of the problem, although stringent criminal penalties for importers of tainted or unsafe products would be one way to motivate the creation of a third-party inspection system.<sup>353</sup> Nevertheless, no matter how compelling the need for regulation, other countries could challenge such solutions as unwarranted barriers to trade.<sup>354</sup>

Because so many domestic agencies, private sector stakeholders, the Department of State, and the U.S. Trade Representative have interest in and expertise to offer in addressing the import problem and are unlikely to convene—much less manage to agree on viable solutions—on their own, the White House must take the lead in making import safety a priority and hammering out a workable system of short- and long-term solutions. OIRA's small staff of economists, trained in the intricacies of cost-benefit analysis, steeped in the negative culture that pervades centralized review, and accustomed to mustering agencies to attack proposals rather than solve problems, is ill-equipped to undertake such a complex and challenging initiative. But because OIRA exists, and has the regulatory system as its portfolio, no other White House office has stepped into this growing

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350. See INTERAGENCY WORKING GRP. ON IMPORT SAFETY, ACTION PLAN FOR IMPORT SAFETY: A ROADMAP FOR CONTINUAL IMPROVEMENT 10–41 (2007), available at <http://archive.hhs.gov/importsafety/report/actionplan.pdf>.

351. *Id.*

352. Coglianese et al., *Consumer Protection in an Era of Globalization*, in IMPORT SAFETY, *supra* note 1, at 3, 12.

353. See Rena Steinzor, *High Crimes, Not Misdemeanors: Deterring the Production of Unsafe Food*, 20 HEALTH MATRIX 175 (2010).

354. For further discussion, see Tracey Epps & Michael J. Trebilcock, *Import Safety Regulation and International Trade*, in IMPORT SAFETY, *supra* note 1, at 69, 69–87.

breach. Further delays in coping with unsafe imports can fairly be laid at OIRA's doorstep.

### *C. If Not OIRA, What?*

We come at last to the question of what should replace OIRA's brand of centralized review. The scope of this Article would be exceeded by a detailed explication of how a new framework should be implemented and, in any event, such details should probably be left to people familiar with the inner workings of the White House staff. But the overarching goals of this recommendation are quite straightforward: White House staff should stop reviewing individual rules and rule proposals on a routine basis, instead delegating this responsibility to the political appointees who lead the agencies and are already accountable for making wise and balanced decisions. On the other hand, some group of the White House staff should assume responsibility for dealing with cross-cutting issues; depending on the depth and persistence of the problem, these assignments should be made on either a permanent or an *ad hoc* basis.

This proposal stops short of urging the abolition of OIRA. Only Congress could get rid of OIRA because it was created by the Paperwork Reduction Act,<sup>355</sup> which assigns a series of discrete tasks having to do with the review of proposals by agencies or departments to require the completion of additional paperwork by citizens, state and local government, or private sector entities.<sup>356</sup>

Placing the senior agency political appointees in the driver's seat makes sense for several reasons. For all practical purposes, agency heads are the public face of an administration with respect to the highest profile regulatory issues, including environmental protection, food, drug, and product safety, and preventing life-threatening hazards in the workplace. These appointees are both confirmed by the Senate and subject to oversight by both Houses of Congress. Without exception, they are substantive experts in the missions their agencies and departments are assigned to undertake, allowing them to consider the full range of policy concerns raised by a given regulatory proposal. They are far sturdier surrogates than anonymous White House staff working in an office "that most people have never heard of."<sup>357</sup>

One objection to this line of reasoning is that agency leaders become captured by the ideologues who dominate their career staffs and lose track

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355. Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501–3521 (2006).

356. Paperwork Reduction Act of 1980, 44 U.S.C. § 3503 (2006).

357. Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 994 (2011) (quoting Martha Minow, Dean of the Harvard Law School, in her introduction of Sunstein when he spoke at the school on March 1, 2010).

of the larger issues a President must consider, including the health of the economy. The fear of bureaucrats-run-amok hypothesizes that the civil service can be captured by the left as well as the right. Leaving an agency on its own will result in skewed policy outcomes, with more protections and regulations than the country can reasonably afford or that its citizens truly want. But this concern is theoretical and is not based in history or reality. Its proponents would be hard pressed to think of a time period when this phenomenon actually happened. EPA Administrator William Ruckelshaus' insistence on regulating lead in gasoline is one potential example of so-called capture by the left: he came under heavy fire from the oil and auto industries as well as White House officials sympathetic to their objections.<sup>358</sup> But the Nixon White House remained ready, able, and willing to hold Ruckelshaus as politically accountable as it dared given the popularity of environmental measures at that historical moment. No one would argue today that removing lead from gas was the wrong decision.<sup>359</sup> Instead, it is viewed as an unequivocal success for the agency.

Some commentators argue that without OIRA, cost-benefit analysis will recede and regulatory agencies will be free to make decisions for a host of flakey, ill-advised reasons, including the most extreme forms of moral or aesthetic preferences.<sup>360</sup> This set of assertions ignores the fact that OIRA has never drafted the regulatory impact analyses required for all rulemaking proposals in the first instance. Rather, this task is accomplished by economists who are firmly ensconced at each of the protector agencies discussed herein. The system would not fall apart were OIRA unavailable to oversee it. I am no fan of cost-benefit analysis, and a robust literature explains its faults.<sup>361</sup> However, the methodology is firmly ensconced as an essential element of the regulatory system. So long as the President orders agencies

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358. See, e.g., FRANK ACKERMAN, POISONED FOR PENNIES: THE ECONOMICS OF TOXICS AND PRECAUTION 38–39 (2008) (“William Ruckelshaus[] had declared that leaded gasoline endangered the public health and welfare and impaired the performance of catalytic converters . . .”).

359. See *id.* at 34 (“Such notable regulatory scholars as John Graham, Robert Hahn, Richard Stewart, Cass Sunstein, and Jonathan Wiener have pointed to the influence of cost-benefit analysis on the 1980s-era lead phase-down as evidence of the evenhandedness of this analytical framework. However, that cost-benefit analysis appeared only in the last act of a long drama.” (footnotes omitted)).

360. See, e.g., DeMuth & Ginsburg, *supra* note 14.

361. See, e.g., ACKERMAN & HEINZERLING, *supra* note 18 (raising the ethical and practical problems with this methodology); Driesen, *supra* note 318 (demonstrating empirically that cost-benefit analysis is one of the factors that weakens the protectiveness of pending rules); Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997 (2002) (concluding that cost estimates are provided by regulated industries and are generally not based on empirical analysis); Parker, *supra* note 18 (rebutting arguments made by proponents of the methodology).

to continue using it, the absence of OIRA should not make a significant difference to the nuts and bolts of its implementation.

Removing OIRA as supervisor-in-chief will not stop industry lobbyists from visiting the White House to get help in their efforts to persuade agency heads to back down from a position, and anticipation of such visits inevitably motivates the political appointee who occupies the office to ensure that she can defend that position. Agencies would still undertake the analyses required by statutes such as the Regulatory Flexibility Act,<sup>362</sup> the Small Business Regulatory Enforcement Fairness Act,<sup>363</sup> and the Unfunded Mandates Reform Act.<sup>364</sup> And they would still be subject to congressional oversight and judicial review—arguably far more potent influences on their possible excesses than OIRA. All of these mechanisms exert substantial pressure on the agencies and help to explain why they can sometimes appear paralyzed by indecision.

There remains the question of how to undertake the difficult and complex work of finding lasting policy solutions to cross-cutting regulatory problems, a function OIRA does not recognize as legitimate and that is a major reason for removing it from any role in the arena of regulatory policy making. The problem has several dimensions: (1) review and coordination of the annual government-wide regulatory agenda; (2) consideration of funding issues that affect the agencies; (3) determination of whether and how the President should support amendments to strengthen the agencies' outmoded legal authorities; and (4) development of solutions to cross-cutting issues that affect more than one agency.

The White House staff has expanded in size over the last two decades to a number in the ballpark of 1,800 to 2,000 people.<sup>365</sup> These resources are adequate to support White House coordination of the annual regulatory agenda, as well as to focus on specific rules that will have a significant impact on the economy. So, for example, a President could decide that energy policy was a top priority for his Administration and ask all relevant agency heads to assemble lists of rules, guidance documents, purchasing policies,<sup>366</sup> and other decisions that might affect the actual, environmental,

362. Regulatory Flexibility Act, 5 U.S.C. §§ 601–12 (2006).

363. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-21, 110 Stat. 857 (codified in scattered sections of 5, 15, 28 U.S.C.).

364. Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501–71 (2006).

365. Farina, *supra* note 15, at 405.

366. See, e.g., Jessica Leber, *Riding a Wave of Culture Change, DOD Strives to Trim Energy Demand*, N.Y. TIMES (July 20, 2009), <http://www.nytimes.com/cwire/2009/07/20/20climatewire-riding-a-wave-of-culture-change-dod-strives-23689.html> (“[T]he U.S. military, the nation’s single largest energy consumer—at more than 1 percent of the U.S. total—has come [far] in recognizing and reducing its reliance on fossil fuels. But experts say . . . the military still has [far] to go . . . . Experts say making strides will require changing the culture of an institution . . . . Several policies already are under way [including a] presidential



and public health costs and benefits of various fuels, as well as proposals with indirect effects on the energy marketplace, such as government-wide greenhouse gas reduction policies.<sup>367</sup> White House staff could work with agency heads to calibrate when and how these proposals would be released, in the process developing a narrative about why the President supports them.

Funding shortfalls increasingly undermine the agencies' effectiveness, and the steady decline in their resources measured in constant dollars<sup>368</sup> makes the alternative of supporting their permitting and licensing activities through specific, dedicated industry fees ever more appealing. For example, the Nuclear Regulatory Commission receives ninety percent of its funding from licensing fees imposed on nuclear power plants.<sup>369</sup> A second example is Title V of the 1990 Clean Air Act Amendments, which shifts the costs of reviewing power plant permits to their private owners and operators.<sup>370</sup> In some states, regulators are allowed to apply the civil penalties they collect toward their daily operations, and this approach is worth exploring at the federal level.<sup>371</sup> Exploration of these alternatives is a task well-suited for a working group of agency and outside experts convened by the White House staff.

Updating the legal authorities available to health and safety agencies to pursue emerging problems is a low priority for Congress unless a well-publicized crisis somehow breaks through this legislative inertia. The President and his White House staff are in the position to ask agency heads to develop priorities for such amendments, and a centralized taskforce might even discover that some of these problems can be dealt with in a piece of legislation that affects multiple agencies at once. So, for example, the anomaly of awarding more severe punishment for harassing a burro in a national park than for grossly negligent conduct that results in the death of a worker<sup>372</sup> could be juxtaposed in such a legislative initiative, with the President arguing that loss of life or injuries to people that are the foreseeable result of regulatory violations should incur stringent, uniform penalties.

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order . . . requir[ing] federal departments to cut energy and water demand and use more renewable energy every year.”).

367. Exec. Order No. 13,514, 3 C.F.R. 248 (2010) (making “reduction of greenhouse gas emissions a priority for Federal agencies”).

368. STEINZOR & SHAPIRO, *supra* note 106.

369. U.S. NUCLEAR REGULATORY COMM’N, FISCAL YEAR 2010: PERFORMANCE AND ACCOUNTABILITY REPORT 15 (2010), *available at* <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1542/v16/sr1542v16.pdf>.

370. 42 U.S.C. § 7661a(b) (2006).

371. *See, e.g.*, MD. CODE REGS. 08.19.04.09(B) (1992).

372. *See supra* Part I.C.2.

Many cross-cutting problems could be addressed by administrative action within the discretion of the President. For example, rationalizing and making more consistent government enforcement policies could benefit from consideration by a White House taskforce. Any enforcement action that does not recoup—at the very least—the avoided costs of complying with the law that was broken has limited deterrent effect. Recovering that amount should be the baseline for any consent decree or complaint, with punitive assessments of civil penalties to discourage others from committing similar violations added on top of such cost recoupment. EPA has developed a sophisticated model for calculating avoided costs,<sup>373</sup> but as the BP situation indicates, other agencies have much to learn from its relatively robust approach.<sup>374</sup> And when noncompliance causes fatal accidents, criminal prosecutions should be expected. It is a cross-cutting policy change worthy of attention from both the agencies and the Department of Justice.

### CONCLUSION

All of the arguments against centralized review made here are further supported by the fact that Presidents are under no obligation to continue the OIRA process. If OIRA's identity as a powerful deregulatory force is as obvious as I claim, its continuation must constitute not just a presidential preference, but a preference that is well-supported by the President's constitutional role. And if a strong, anti-regulatory OIRA is what presidents think they want, why shouldn't they have it?

This argument is particularly salient in the context of the Obama administration because Cass Sunstein is the best educated, most prolific intellectual ever to serve as OIRA Administrator,<sup>375</sup> as well as an early supporter of the President who appears to enjoy his full confidence.<sup>376</sup> Sunstein could have broken with OIRA's long-standing institutional identity, instead envisioning his role as the architect of fundamental reforms that would make the broken regulatory system work. A group of academic colleagues, including the author, urged him to consider this alternative soon after he took office:

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373. *Enforcement Economic Models*, EPA, <http://www.epa.gov/oecaerth/civil/econmodels/index.html#ben> (last updated Nov. 19, 2009).

374. *See supra* Parts I.B.2, I.B.7.

375. A profile in *NEW YORK TIMES MAGAZINE* described him as “certainly the most productive and probably the most influential liberal legal scholar of his generation . . .” Benjamin Wallace-Wells, *Cass Sunstein Wants to Nudge Us*, *N.Y. TIMES MAG.*, May 16, 2010, at 38.

376. Sunstein, *supra* note 233.

The U.S. regulatory system—over which OIRA has a uniquely far-reaching influence—is at a critical juncture. Following years of neglect and, more recently, outright hostility from the George W. Bush administration, the system is in disrepair . . . . To repair the badly broken regulatory system, the next OIRA Administrator will need to re-imagine OIRA's role to ensure that this little known but powerful office is part of the solution, rather than part of the problem.<sup>377</sup>

Sunstein not only ignored this opportunity, but continued business as usual at OIRA.

When the 2010 midterm election turned against President Obama for reasons having nothing to do with health, safety, or environmental regulations, Sunstein helped to turn the administration further toward a narrative that is consistent with OIRA's institutional identity: regulation has a direct bearing on the economy, and in times of economic stress the nation cannot afford it. We can assume that the President participated in the decision to make this change, just as he put Sunstein in office knowing what the appointment would mean.

Because most discussions of unitary executive theory focus on the theoretical scope of presidential authority, as opposed to the policy ramifications of the decisions the President makes in any given context, believers in the doctrine begin and end there.<sup>378</sup> The President should have whatever he wants, certainly with respect to managing the Executive Branch. In contrast, the validity of the arguments I have made here depends not on whether the President has the authority to continue OIRA, but rather on whether it is a good idea for him to do so. Under-regulation is a much more serious problem than over-regulation. Centralized White House review should be abolished because that outcome would be best for the American public.

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377. Signatories of this document, entitled *Reinvigorating Protection of Health, Safety, and the Environment: The Choices Facing Cass Sunstein*, include Professors John S. Applegate, Robert L. Glicksman, Thomas O. McGarity, Sidney A. Shapiro, Amy Sinden, Rena I. Steinzor, and Robert R.M. Verchick. JOHN S. APPLGATE ET AL., CTR. FOR PROGRESSIVE REFORM, REINVIGORATING PROTECTION OF HEALTH, SAFETY, AND THE ENVIRONMENT: THE CHOICES FACING CASS SUNSTEIN (2009), available at <http://www.progressivereform.org/articles/SunsteinOIRA901.pdf>.

378. Some unitary executive enthusiasts argue that presidential control is constitutionally mandated. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992). Others embrace it as a better way to run domestic policymaking. See, e.g., Kagan, *supra* note 13; Lessig & Sunstein, *supra* note 13. In a notable departure from this approach, Professor Farina has warned that accretion of executive power can have intolerable policy results for the country. See Farina, *supra* note 15, at 423–24.

The nation has embraced health, safety, and environmental regulation as an affirmative and important role for government. Despite this broad support for regulatory schemes, deregulatory forces have managed to hobble the regulatory state through funding shortfalls, political interference, and neglect of the crucial job of updating the agencies' statutory mandates. All of these efforts have been largely invisible to the voting public. But by the end of the George W. Bush administration, which pursued these techniques with a vengeance, regulatory agencies were on life support.

The worldwide recession that was in its infancy when President Obama took office had the effect of shoving the implications of this unacceptable state of affairs to the back burner. Even the nation's fixation on live video feed of the billowing plume of oil at the bottom of the Gulf of Mexico was not enough to elevate these issues.

Pragmatists might suggest that President Obama was prudent to respond to a shift in the balance of power in Washington, D.C. But the President and his staff have ignored the probability that in the absence of real reform, life-threatening episodes are likely to recur, causing irrevocable damage and, not incidentally, further tarnishing the administration's legacy. Aggressive rulemaking and enforcement are essential antidotes to a chaotic global economic environment that creates irresistible incentives for companies to cut corners.

The goal of this Article is to demonstrate that OIRA continues to serve as the bottleneck for protective regulation, as its founders designed it and as its critics have long alleged it to be. It has systematically ignored the most important problems that affect the administrative state, including regulatory failure and agency dysfunction. OIRA is tiny, and most staff members are economists with training in the details of cost-benefit analysis but scant experience with the other disciplines needed to inform policy making. All of OIRA's Administrators have accepted its historical mission and suffered from a lack of insight and imagination.

The President and the nation would be far better served if he abandoned the effort to centralize control over individual regulations within the White House, instead leaving the political appointees who head the relevant agencies and departments as the first and last line of accountability for those efforts. If this or any other President truly wants to "win the future," OIRA's myopia and hostility must give way to an affirmative vision of how government can protect those who truly cannot protect themselves.<sup>379</sup>

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379. Obama, *supra* note 10.

## APPENDIX

TABLE 1  
THE RIA'S COMPARISON OF REGULATORY BENEFITS TO COSTS

	<i>Strong Option Subtitle C</i>	<i>Weak Option Subtitle D</i>	<i>Weakest Option Subtitle "D prime"</i>
1. Regulatory Costs:	\$20,349	\$8,095	\$3,259
2. Regulatory Benefits:	(\$230,817) to \$102,191	\$1,168 to \$41,761	\$593 to \$17,501
3. Net Benefits (2-1)	(\$251,166) to \$81,842	(\$6,927) to \$33,666	(\$2,666) to \$14,242
4. Benefit/Cost Ratio (2/1)	(11.343) to 5.022	0.144 to 5.159	0.182 to 5.370

Present Values in \$Millions at 7 percent Discount Rate over 50-Year Future Period-of-Analysis 2012 to 2061<sup>380</sup>

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380. Comments from Ctr. for Progressive Reform, *supra* note 263, at 8 tbl.1.

TABLE 2  
THE RIA'S COMPUTATION OF REGULATORY BENEFITS

<i>Benefit Category</i>	<i>Strong Option Subtitle C</i>	<i>Weak Option Subtitle D</i>	<i>Weakest Option Subtitle "D prime"</i>
Groundwater Protection Benefits	\$970	\$375	\$188
Avoided Human Cancer Risks	\$504 (726 cancer risks)	\$207 (296 cancer risks)	\$104 (148 cancer risks)
Avoided Groundwater Remediation Costs	\$466	\$168	\$84
Avoided Impoundment Spill Costs	\$1,762 to \$16,732	\$793 to \$7,590	\$405 to \$3,795
Impact on Beneficial Use	(\$233,549) to \$84,489	\$0 to \$33,796	\$0 to \$13,518
Scenario #1: Increase	\$84,489	\$33,796	\$13,518
Scenario #2: Decrease (stigma)	(\$233,549)	\$0 (no impact)	\$0 (no impact)
Scenario #3: No impact	\$0 (no impact)	\$0 (no impact)	\$0 (no impact)
<b>Total Benefits:</b>	<b>(\$230,817) to \$102,191</b>	<b>\$1,168 to \$41,761</b>	<b>\$593 to \$17,501</b>

Present Values in \$Millions at 7 percent Discount Rate over 50-Year Future Period-of-Analysis 2012 to 2061<sup>381</sup>

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381. Comments from Ctr. for Progressive Reform, *supra* note 263, at 9 tbl.2.

