THE COST IS TOO HIGH

How Susan Dudley Threatens Public Protections

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Acknowledgments

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Introduction

On August 1, 2006, the Bush administration nominated Susan Dudley to the position of administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). As head of OIRA, the White House office charged with reviewing draft regulations, Dudley would be in a position to cripple critical safeguards that protect the public from such dangers as unsafe products and environmental toxins. And Dudley, an anti-regulatory zealot with close ties to corporate interests, is certain to do just that as OIRA administrator.

Prior to her nomination, Susan Dudley worked as the director of the Regulatory Studies Program at the Mercatus Center, an industry-funded, anti-regulatory advocacy organization. While at Mercatus, Dudley attacked proposed regulations in formal submissions to government agencies and orchestrated campaigns to derail other safeguards already on the books. Displaying an extreme anti-regulatory ideology, she questioned the merit of regulation altogether in congressional testimony and regulatory comments, and she has urged weakening, if not eliminating entirely, public safeguards. If confirmed as OIRA administrator, Dudley would continue her anti-regulatory agenda from a position with enormous power over federal health, safety, and environmental protections, and the public would be forced to pay the price.

Dudley's nomination signals the latest chapter in the administration's war on public safeguards. OMB's so-called "review" process has been used to block the issuance of key health and safety standards. The strategic position of OMB in the assault on regulations is summed up in the statement of Bruce Josten, the U.S. Chamber of Commerce's executive vice president for government affairs, that "[i]f you fix [OMB], you rein in all the agencies."[1] The previous OIRA administrator, John Graham, whose controversial 2001 nomination was opposed by 37 senators, used his position to undercut regulations developed by agencies ranging from the Occupational Health and Safety Administration (OSHA) to the Food and Drug Administration (FDA) to the National Highway Traffic Safety Administration (NHTSA), weakening their policies and diminishing their ability to develop new safety and health standards. Graham also pursued policy-level changes such as risk assessment guidelines and a regulatory hit list — tools that will slant the playing field and roll back essential protections for years to come. But compared to Dudley, Graham looks like a moderate.

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[1] Cindy Skrzycki, *Lining Up to Lobby for Rule Rescission*, WASH. POST, Feb. 6, 2001, at E1.

There are three reasons why Susan Dudley should not be OIRA administrator:

Ideological opposition to regulation. First, her ideological opposition to regulation precludes her from making unbiased decisions concerning public safeguards. As is apparent from the regulatory comments she wrote while at Mercatus, Dudley's hostility to regulation is so deep-seated that she is blind to the critical role they play in protecting the public and environment from harm. In her analyses of regulations, Dudley fails to employ neutral policy tools; rather, she adopts shifting and sometimes contradictory reasoning that is only consistent in that it always leads to the conclusion that a regulation should be rejected or weakened. Dudley has also explicitly expressed fundamental opposition to safety standards, attacking a proposed advanced air bag rule because it "attempts to make all vehicles equally safe for occupants."[2] It is apparent from her record that Dudley would demand impossible requirements that regulatory agencies could never satisfy. An OIRA administrator with such an extreme ideological hostility to regulation would clearly have a devastating effect on safeguards needed to ensure the health and safety of the public and to protect the environment, thus undermining the purpose and intent of safety and health statutes and putting the public at unnecessary risk of harm.

Paralysis by analysis. Dudley also supports radical regulatory policies that would cripple public safeguards — another reason why she should not be OIRA administrator. Dudley has, for instance, advocated regulatory sunsets, or mandatory expiration dates for all protective standards, which would force agencies to plead for the continuation of critical regulations. If confirmed, Dudley would almost certainly use the political clout of the White House to push sunset legislation, which she would then enforce zealously. Dudley has also called for embedding cost considerations in all laws that authorize agencies to protect the public, including laws that Congress has declared should be "safety first" laws under which cost-benefit analysis is forbidden in decision-making. And perhaps even more appallingly, Dudley has supported a senior death discount that counts the lives of seniors for less than the lives of the young. Dudley's radical ideas also include proposals that would consume vast amounts of taxpayer dollars on navel-gazing analyses that would tie up agency money, resources and time on increased analysis of regulatory costs while doing little to inform the public about the life-

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[2] Susan E. Dudley, *Regulatory Studies Program Comments: Advanced Air Bags* 7 (Dec. 17, 1998), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC1998-04_NHTSA-AirBags_981130.pdf>.

saving benefits of sensible safeguards. For Dudley, the goal is a regulatory clear-cut, and she is well-acquainted with the tools to achieve it.

Ties to corporate special interests. The third reason why she should not serve as OIRA administrator is her ties to regulated industry. Prior to her nomination, Susan Dudley worked for the corporate-founded and -funded Mercatus Center, whose donors have included companies with long records of pushing for deregulations, such as BP Amoco, Exxon Mobil Corporation, General Motors, JP Morgan Chase, Merrill Lynch, Pfizer, and State Farm Insurance Companies, as well as individuals from the corporate world such as David Koch, an executive vice president of Koch Industries,[3] who personally provided $100,000 in 2005.[4] Such ties to regulated industry suggest that Dudley, like Graham before her, would use OIRA as corporate special interests' private backdoor for influencing policy.

If Dudley is made OIRA administrator, she will sit in the catbird seat, overseeing the entire executive regulatory process. Only the independent regulatory agencies will be outside her direct regulatory reach. No significant safety, health, environmental, or any other proposed or final rules can be issued without OIRA's approval. Nor, under the Paperwork Reduction Act, can any government agency gather information from ten or more entities, a move which is often essential for the research that justifies regulation, without approval from OIRA. Through these mechanisms, OIRA can slow, stall, weaken or stop regulatory proposals and final rules that the regulated industry opposes.

Like John Graham, Dudley is well acquainted with the regulation-stalling techniques that induce "paralysis by analysis." As demonstrated by her writings, Dudley wants federal agencies to wait to impose rules until near-perfect estimates of the precise causes and effects of the hazards to be regulated are known. But regulators often know that a substance or product is dangerous long before they can measure the exact magnitude of the harm, extent of the exposure, or exact mechanism by which a substance acts on the human body or environment. Collecting this secondary information can take years — years during which the public will continue to be exposed.

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[3] David H. Koch Charitable Foundation, IRS Form 990, 1999 and 2000.

[4] The Campaign for George Mason University, *Fast Facts*, Oct. 27, 2005, *available at* <http://www.gmu.edu/development/pubs/fastfacts/October_2005/email.htm> (last accessed Feb. 23, 2006).

And Dudley even goes a step farther than Graham, who relied primarily on cost-benefit analysis (CBA) to stall regulations by demanding that their benefits outweigh their costs. Dudley believes that an agency must do more than prove that a regulation's benefits outweigh its costs. Dudley has stated that "[e]ven policies supported by the best benefit-cost analysis are not likely to be socially optimal substitutes for market forces unless they correct a market failure."[5] With her skepticism about whether regulation can serve any goal other than correcting a market failure (which, as she has defined it, would be an impossibility), Dudley would bog the agencies down in endless analysis, stalling regulations and leaving the public at risk. Paralysis by analysis is just one way in which Dudley could cripple public and environmental safeguards as OIRA administrator.

Susan Dudley's nomination is a threat to the health and safety of the public and the protection of the environment. Her extremist anti-regulatory ideology served well the Mercatus Center's corporate funders, but it would not serve well the American public. For the reasons detailed in this report, Susan Dudley should not be OIRA administrator. In words Dudley herself would surely understand, the cost is too high.

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[5] *See* Susan E. Dudley, *2005 Draft Report Comments: Public Interest Comment on the Office of Management and Budget's 2005 Draft Report to Congress on the Costs and Benefits of Regulation* 11 (June 20, 2005), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2005-06OMBBCReport_050620.pdf >.

Get to Know Susan Dudley: A Case Example

One case example epitomizes all the reasons that Susan Dudley is unfit to be given power over regulatory policy: Dudley's opposition to improved standards for life-saving air bags in passenger vehicles.

After Congress ordered the National Highway Traffic Safety Administration (NHTSA) to issue a general performance standard requiring frontal air bags in all passenger cars by fall 1996 and in light trucks by fall 1997, the automakers responded by installing cut-rate air bags that proved dangerous. Congress subsequently acted in 1998 to require NHTSA to improve the standard by minimizing risks to children and small-statured adults, and the result was the 1998 proposed rule for advanced air bags.

Mercatus, in comments prepared by Susan Dudley, opposed NHTSA's rulemaking. Revealing an extreme anti-regulatory ideology, Dudley argued that the market would maximize safety, suggested elimination of the air bag rule altogether, and voiced general opposition to all safety standards. Ironically, it was precisely a lack of regulation that led to the air bag tragedies Congress required NHTSA to address in the advanced air bag rulemaking, as manufacturers chose to install cut-rate air bags in the absence of a stringent regulation requiring advanced designs.

Dudley's blind adherence to anti-regulatory principles even in the face of specific congressional requirements puts her out of touch with both reality and the values and beliefs of Americans. It did, however, make her a perfect fit for Mercatus and placed her and Mercatus in the corner with manufacturers in their fight against tougher air bag regulations. Also, it may not be a coincidence that Mercatus has received significant funding from automakers.[6]

Manufacturers Fail to Provide Safe Air Bags; NHTSA Takes Action

In September 1998, NHTSA proposed upgraded performance requirements for air bags that would reduce air-bag related risk to infants, children, and small-statured persons.[7] At the time of the 1998 notice of proposed rulemaking (NPRM), air bags had demonstrated significant safety benefits in crashes, but certain shoddily

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[6] Email from Mercatus staff member, March 24, 2006.

[7] Federal Motor Vehicle Safety Standards: Occupant Crash Protection, 63 Fed. Reg. 49,958 (Sept. 18, 1998).

designed air bags had contributed to injury and death of occupants, most notably children and some small women drivers.

The agency noted, in fact, that "[a]ir bag fatalities are not a problem inherent in the concept of air bags," and listed air bag design features — such as higher deployment thresholds before any inflation, dual-stage inflators, upward deployment, and deployment suppression — that would reduce or eliminate the fatalities that had been occurring.[8] Such features, the agency explained, were permitted by the air bag standard, and a number of them were identified by the agency in 1980 and again in 1984 as ways in which manufacturers could minimize potential dangers of air bags.[9] Notably, Honda's early front passenger air bag deployed upward rather than directly at the passenger, minimizing risk of deployment-related injuries.[10] Few manufacturers, however, used such safety features, and instead exploited the breadth of NHTSA's performance standard to equip vehicles with less expensive, less protective designs (such as using mechanical rather than electronic sensors). NHTSA's 1998 NPRM proposed upgraded testing requirements intended to ensure that all manufacturers used safe air bag designs. The agency estimated that its proposed rule would save between 226 and 239 lives annually.[11]

Leave it to the Market…

The issue was simple: manufacturers had failed to use safe air bag designs, so regulatory action was needed to ensure that manufacturers equipped vehicles with safe air bags. But Susan Dudley opposed regulatory action in comments to the proposed rulemaking submitted on behalf of Mercatus.[12] In fact, displaying characteristic anti-regulatory zealotry, Dudley argued for the elimination of the air bag requirement altogether.

Dudley would have preferred to leave safety to the unsteady hand of the market, hypothesizing that "[i]f air bags protect lives, and consumers demand them,

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[8] *Id.* at 49,963.

[9] *Id.*

[10] Honda, *available at* <http://corporate.honda.com/safety/details.aspx?id=airbag>.

[11] 63 Fed. Reg. at 49,983.

[12] *See* Dudley, *Advanced Air Bag Comment*, *supra* note 2 (also available at <http://dmses.dot.gov/docimages/pdf32/48314_web.pdf>).

it is reasonable to assume that automobile manufacturers would have installed air bags in the absence of federal requirements to do so."[13] According to Dudley, federal action requiring air bags in cars was unnecessary, as the market would have provided air bags to the public absent regulation.

But the history of air bags shows that Dudley's naïve advocacy of anti-regulatory principles is misplaced. If not for regulation, manufacturers might not have equipped vehicles with air bags at all. In fact, they fought air bag installation for 20 years, during which hundreds of thousands of highway users needlessly died or suffered severe injuries. Moreover, leaving air bags to the market priced out many who might otherwise have demanded the safety feature: Dudley assiduously failed to mention that consumers were forced to pay five times more for air bags as optional features than for air bags as standard equipment.

Regulation Prompted Resistant Manufacturers to Install Air Bags

Without regulation, public access to air bags might have been delayed indefinitely. General Motors installed air bags on 10,000 1974 and 1975 production vehicles even though President Nixon had delayed the 1970 safety standard requiring air bags to meet passive restraint requirements, but the other U.S. manufacturers fought them tooth and nail. For instance, following issuance of the 1970 rule, Ford launched a multi-million dollar ad campaign intended to instill in the public skepticism about air bags.[14] The Supreme Court, in a 1983 suit by insurers and consumers challenging the Reagan administration's revocation of the air bag standard, characterized manufacturer opposition to air bags as "the regulatory equivalent of war," although by that time the war was "lost — the inflatable restraint was proven sufficiently effective.... [T]he industry was not sufficiently responsive to safety concerns."[15]

Manufacturers Manipulate Information to Boost Sales

Even if manufacturers would have equipped vehicles with air bags absent regulation, consumers might not have been made aware of the safety benefits they

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[13] *Id.* at 5.

[14] RALPH NADER, UNSAFE AT ANY SPEED lxxv (New York: Knightsbridge, 1991).

[15] *Motor Vehicle Manufs. Assoc., Inc., v. State Farm,* 463 U.S. 29, 49 (1983).

offer — especially in light of Ford's smear campaign — and thus would not have demanded them. Dudley, however, claimed in her comments that "[a]utomobile manufacturers have every incentive to inform consumers … of the safety features of their vehicles," believing that this incentive will ensure that consumers are provided with accurate information about vehicle safety.[16]

The real world works much differently than Dudley's hypothetical one. While manufacturers might be able to make air bags a selling point, they also do not want to dissuade customers from purchasing one of their models not equipped with air bags. Manufacturers do promote air bags today — now that they are mandated in all vehicles. After President Reagan revoked the air bag rule in 1981, only Mercedes installed air bags voluntarily in vehicles for sale to the public. Even then, Mercedes' advertisement of the safety feature was minimal.

Moreover, manufacturers commonly manipulate information in the interest of sales. For another example, look no further than Ford's handling of the hazards posed by weak roofs when SUVs roll over. For decades, Ford has done its best to downplay the dangers of roof crush in rollovers, and has recently continued to do so even while Volvo, a subsidiary of Ford, equips its XC90 SUV with a roof designed to resist intrusion (the inward crushing of the roof that intrudes on the space the vehicle occupant needs to survive the crash) in rollover crashes. In spring 2005, a number of news stories brought attention to internal industry documents showing that Ford weakened the roof of the Explorer while Volvo designed the XC90 to protect occupants from the dangers of roof crush in rollover crashes.[17]

The hypocrisy of Ford's actions could not be more obvious: Ford has insisted for decades that a crushing roof does not cause injury in rollover crashes;

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[16] Dudley, *supra* note 2, at 5.

[17] Ford has actually fought to keep the public in the dark on this evidence. The documents were introduced in a Florida wrongful death case in which Ford was ordered to $10.2 million in damages to the husband of a woman who was killed when her Ford Explorer rolled over and the roof collapsed. After the documents were temporarily placed in the court's public record, they were submitted to NHTSA's public docket of comments concerning the agency's roof crush rulemaking. Ford successfully moved to have the court seal the documents and then requested NHTSA to remove the documents from the docket, which the agency promptly did. Public Citizen and Trial Lawyers for Public Justice have filed a motion to unseal the documents on the grounds that keeping them sealed violates Florida's Sunshine Act, which forbids court orders that conceal "public hazards," and the First Amendment of the U.S. Constitution, which creates a strong presumption of public access to information brought to light in civil trials.

reduced vehicle roof strength, selling rollover-prone SUVs with roofs that barely exceed the government's paltry roof strength standard; and covered up engineering documents tying roof crush to injury in rollover crashes. Volvo, Ford's subsidiary, on the other hand, designed the XC90 SUV with increased roof strength on the premise that preventing roof intrusion is critical to ensuring occupant protection in rollovers, and it used the XC90's roof strength to market the vehicle to consumers, boasting in a promotional video that it has a roof that "exceeds the legal requirements in the U.S.A. by more than 100 percent."[18]

As this case demonstrates, manufacturers will manipulate information to downplay the risks of their vehicles, even while touting the exact same safety features those vehicles lack when equipped on other models. The incentive to publicize safety features, which Dudley believes ensures that consumers are provided with information sufficient to make informed purchasing decisions, is often absent or, at best, negligible.

Manufacturers May Use Inferior Safety Designs

Dudley's anti-regulatory convictions also neglect whether, even if manufacturers voluntarily install safety features absent regulation, the safety features that manufacturers install will provide a sufficient level of safety. It is not surprising that Dudley neglected to address this question in her comments to the advanced air bag rulemaking, as, in the absence of a stringent air bag regulation requiring advanced features, many manufacturers installed cut-rate air bags and did not use available technology to minimize the risk air bags can pose to small-statured adults and children.

Before Congress required an improved standard in 1998, NHTSA relied on broad performance requirements that allowed manufacturers to use a number of designs in complying with the standard. As NHTSA noted, the "standard has always permitted, but not required, vehicle manufacturers to use a variety of design features that would reduce or eliminate the fatalities that have been occurring."[19] The 1998 advanced air bag rulemaking was initiated precisely because many

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[18] *See* Danny Hakim & Jeremy W. Peters, *Ford and Volvo Clash Over Automobile Safety: Dispute Centers on Role Crushed Roofs Play in Nearly 40,000 Rollover Accidents*, INT'L HERALD TRIB., May 14, 2005. The video is available for download at <http://www.citizen.org/autosafety/images/XC-90Video.avi>.

[19] Notice, 63 Fed. Reg. 49,958, 49,963 (Sept. 18, 1998).

manufacturers did not use those technologies, leading to unnecessary deaths and injuries. Even at the time of the rulemaking, in the face of the controversy surrounding air-bag related deaths and injuries, many manufacturers still neglected to adopt technologies to address the risks presented by their poorly designed air bags.[20]

Manufacturer Self-Interest Is Unreliable

Dudley's belief that supply and demand will provide safety to consumers assumes that manufacturer self-interest can be relied upon to provide the public with safe vehicles. Such is not the case. Though public safety can be lucrative for manufacturers, some may not recognize opportunities to boost sales through safety. A 2004 poll, for instance, found that 81 percent of consumers favor stronger vehicle roofs and 83 percent want "the government to require a major upgrading of roof safety standards to withstand the weight of the car when it rolls over."[21] Yet despite clear consumer demand for stronger roofs, by and large, manufacturers have failed to produce vehicles with roofs strong enough to protect occupants in rollover crashes. The history of automobile production is full of cases in which manufacturers skimped on safety, even though consumers rate safety the second most important factor (behind reliability) when purchasing a vehicle.[22]

In addition, manufacturer self interest and public safety can conflict. For example, manufacturers often offer optional safety equipment only in pricey packages, apparently finding it more lucrative to group a safety feature with add-ons such as leather seats and sunroofs. But this practice places safety features financially out of reach for many customers, depriving lower- and middle-income consumers and their families the safety afforded to the wealthy. And even when offered independently of other features, safety technologies may still be out of the financial reach of many consumers.

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[20] *See id*.

[21] Louis Harris and Peter Harris Research Group, Inc., "Survey of the Attitudes of the American People on Highway and Auto Safety," June 2004, *available at* <http://www.saferoads.org/polls/harrispoll04.htm>.

[22] Harris Interactive, "National Survey Shows 29% of Those Who Intend to Acquire a New Vehicle in the Next Year Will Seek Fuel-Efficiency If Gas Prices Hit $2 Per Gallon," April 14, 2003, *available at* <http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=607>.

Regulation, however, significantly reduces the cost of safety technologies to consumers[23] and ensures that all consumers are provided with a base level of safety.

Dudley Imagines a World Without Safety Standards

But Dudley's hostility to regulation runs even deeper. In her comments to the advanced air bag rulemaking she stated that "[m]andating a certain level of protection in all new vehicles is unlikely to meet the diverse demands of different consumers,"[24] and attacked the proposed rule because it "attempts to make all vehicles equally safe for occupants."[25]

This fundamental opposition to essentially *any* safety standard sets Dudley apart from even the Bush administration's notoriously anti-regulatory policies. It also conflicts with the duties Congress carved out for NHTSA as a safety agency, providing it with the authority to issue motor vehicle safety standards and noting that "it is necessary…to prescribe motor vehicle safety standards" to reduce traffic deaths and injuries.[26]

Conclusion

With similar anti-regulatory zealotry, Mercatus and Susan Dudley were a perfect fit for each other. But the extreme market ideologies revealed in Mercatus's comments to the advanced air bag rule place both Mercatus and Susan Dudley out of step with the American people, Congress, and even the anti-regulatory Bush administration. The effort to deflate air bags was only the beginning.

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[23] Side air bags, if sold as standard equipment, cost automakers $76. (*See* Advocates for Highway and Auto Safety, "Cost/Price Comparison of Vehicle Technologies." If sold as optional equipment equipment, the cost to consumers of side air bags on the 2004 Mazda 6 was $390. (Source: Edmunds.com)

[24] Dudley, *supra* note 2, at 6.

[25] *Id*. at 7.

[26] 49 U.S.C. § 30101.

Dudley's Impossible Requirements

If allowed to assume the role of administrator of the OMB Office of Information and Regulatory Affairs, Dudley would be granted enormous powers over the regulatory standards that agencies are currently developing. Although OIRA has no such power under the Paperwork Reduction Act, the law that actually created that office, the White House extralegally empowered it to review significant regulations before they are published in the *Federal Register*. Previous regulatory czars have used this power to, among other things, delay a required warning label on aspirin informing parents of the risks of Reye's Syndrome[27] and weaken a proposed rule for electronic signals in automobiles warning drivers when their tires are dangerously underinflated.[28]

Dudley's background reveals someone who would set expectations that would be impossible for any agency submitting proposed regulations to OIRA to satisfy. In her tenure at Mercatus, Dudley has authored comments on a host of environmental, health, and safety regulations. While her tactics vary from case to case, the bottom line is always the same: a call for less regulation of industry.

Rather than applying consistent, neutral policy tools to analyze regulatory decisions, Dudley employs ever-shifting criteria that are consistent only in their outcome: rejecting the need for regulation that protects public health, safety, or the environment. If Dudley really did work as a neutral policy analyst, employing the tools at her disposal to determine sound policy decisions, then we would expect to see analysis supporting the need to regulate as well as analysis determining that regulation is not necessary. Rather, Dudley's analysis acts as a one-way ratchet, proclaiming that the costs are too high and the benefits too low.

Dudley's analysis generally begins by discrediting the very need for regulation, claiming that the agency has not shown that there is a market failure warranting regulatory intervention. If the harm could not be fixed without intervention into the market, then Dudley asserts that there is not enough evidence to substantiate the claim that a harm has been or will be incurred. In Dudley's view, the market almost never fails. Faced with ample evidence of harm, Dudley will then assert that the federal government is not in the best position to address the harm and local communities are in a better position to address the problem. With

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[27] *See* PUBLIC CITIZEN, RISKING AMERICA'S HEALTH AND SAFETY: GEORGE BUSH AND THE TASK FORCE ON REGULATORY RELIEF 8 (Oct. 1988).

[28] *See* OMB Watch, *In Rejecting NHTSA Rule, Graham Shows True Colors*, OMB WATCHER, May 15, 2002, *available at* <http://www.ombwatch.org/article/articleview/739>.

this ever-shifting terrain, it is difficult to see how any agency would ever be able to justify the need to regulate.

The Market Never Fails

Dudley insists, with a slavish devotion to the market, that regulation is only justified when it is used to correct a market failure. In textbook economics, a market failure is "a situation in which a market left on its own fails to allocate resources efficiently."[29] It is a macroeconomic term of art that notably does not mean that markets fail to exist altogether or have broken down in some way.[30]

Dudley has apparently redefined the term *market failure*. In her work, she has repeatedly invoked the term to mean a breakdown in market relations, and she has even insisted that the contrast between a problem for the public interest and the absence of any absolute breakdown in markets must mean that the public has chosen an unsafe and less healthy world. Dudley uses this redefined market failure as a threshold test for all regulations: her main line of attack is to claim that the agencies have failed to show that a market failure has truly occurred, thereby undercutting the need for regulatory intervention. Dudley believes agencies must prove that a market failure has occurred before they can act, but then she denies the validity of evidence claiming a need for regulatory intervention. Agencies must prove a market failure, but markets never fail.

In this shift from economics to Dudleynomics, the very need for regulation to correct important public health, safety, environmental, or consumer problems is

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[29] N. GREGORY MANKIW, PRINCIPLES OF MACROECONOMICS 10 (1998). *See also* DAVID L. WEIMER & AIDAN R. VINING, POLICY ANALYSIS: CONCEPTS AND PRACTICE 13 (2d ed. 1992) (defining market failure as "a circumstance where the pursuit of private interest does not lead to an efficient use of society's resources or a fair distribution of society's goods").

[30] *See, e.g.*, Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COPYRIGHT SOC'Y OF THE U.S.A. 149, 150-51 (2003) ("The point of 'market failure' as a category is not to catalogue individual buyers' and sellers' private frustrations. Rather, the concept of 'market failure' provides tools for economists and other observers to assess when privately motivated deals can or cannot be relied upon to suit public ends."); *Market Failure*, Wikipedia, *available at* <http://en.wikipedia.org/wiki/Market_failure> (last accessed Aug. 23, 2006) ("The word 'failure' here is not intended to mean an economic collapse, or a breakdown in market relations. *Market failure* is a claim that the market is failing to create maximum efficiency. It doesn't mean that the market has broken down or ceased to exist.").

itself proof that there is no market failure and thus no need for regulation. That is, *the need for regulation is proof that there is no need for regulation*. The examples are plentiful:

- *Rejecting standards to improve air bags, after manufacturers installed cut-rate airbags and bottom-shelf technology that endangered vehicle occupants:* "If air bags protect lives, and consumers demand them, it is reasonable to assume that automobile manufacturers would have installed air bags in the absence of federal requirements to do so."[31]

- *Rejecting the Clinton administration's proposed standards for ergonomics, to protect workers from musculoskeletal disorders and repetitive stress injuries*: "OSHA offers no evidence that employers and employees do not have adequate incentives to provide the optimal level of workplace protection against MSD hazards. On the contrary, OSHA provides evidence that . . . MSDs impose significant costs on employers, which should offer ample incentives to reduce their occurrence . . . ."[32]

- *Rejecting an SEC rule to protect consumer privacy by limiting financial institutions' ability to share customer financial information without proper consent*: "The implicit premise of the rule is that individuals and firms cannot come to a mutually satisfactory agreement as far as privacy is concerned without resort to government assistance. Indeed, if individuals truly value their privacy, and firms desire to maximally satisfy their customers, then a meeting

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[31] Dudley, *supra* note 2, at 7.

[32] Susan E. Dudley & Hayden G. Bryan, *Ergonomics Comment: Public Interest Comment on the Occupational Safety and Health Administration's Proposed Ergonomics Program Standard* 28 (Feb. 25, 2000), *available at* <http://mercatus.org/publications/pubID.1505/pub_detail.asp>.

of the minds ought to be achievable without resort to compulsory regulations."[33]

- *Rejecting a rule to maintain the public's right to know about the risks they would face from a chemical plant accident or attack*: "If there is a public demand for this information, as EPA's benefit assessment argues, nongovernmental organizations would find value in deriving it. The fact that they don't suggests that the value of the information to the public is less than the cost of the information."[34]

Although markets apparently never fail, Dudley nonetheless considers her unique view of market failure as the essential precondition for any regulation. In commenting on OIRA's 2003 guidelines for regulatory impact analyses (the economic rationales for regulations, required extralegally under Executive Order No. 12,866), Dudley took the unusual approach of blasting the guidelines for allowing agencies to justify regulations for reasons other than a market failure. "The new guidelines cite 'other possible justifications' for regulatory action, including 'promoting privacy and personal freedom.' It provides no example of when regulation (which, almost by definition, restricts personal freedoms) would be necessary to promote personal freedom," Dudley commented.[35] To the extent that Dudleynomics still resembles economics, it is worth noting that Pareto efficiency criteria are blind to equity considerations or distributive justice. Given Dudley's hostility to "other possible justification" for regulations beyond market failure, such important goals as environmental justice, civil rights, and fairness will be systematically rejected by a Dudley-led OIRA.

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

[34] Susan E. Dudley, *RMP Comments: Public Interest Comment on EPA's and DOJ's Proposed Distribution of Off-Site Consequence Analysis Information* 9 (June 8, 2000).

[35] *See* Susan E. Dudley & Brian F. Mannix, *2003 Draft Report Comments: Public Interest Comment on the Office of Management and Budget's Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations* 10 (April 29, 2003), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2003-11OMBBCReport_030429.pdf>.

Even a clear economic case supported by a cost-benefit analysis will not be enough for Dudley. Dudley opposed Department of Energy efforts to set energy conservation standards for appliances, claiming that "[i]n the absence of a significant market failure (which DOE does not identify to justify its regulations), it is implausible that restricting consumer choices will increase net benefits."[36] She put the matter more plainly last year: "Even policies supported by the best benefit-cost analysis are not likely to be socially optimal substitutes for market forces unless they correct a market failure."[37]

We Can Never Know Enough

Even when the agencies' cost-benefit analysis justifies the regulatory action, Dudley's tactic is to attack the underlying science on which the regulation is based. E.O. 12,866 requires agencies to rely on the best available scientific and technical information to justify regulating, but Dudley's approach seems to require agencies to base regulatory decisions on a nearly unachievable level of certainty.

In just one example, Dudley questioned the use of science in setting National Ambient Air Quality Standards (NAAQS) for ground-level ozone (O_3) emissions. As EPA noted in its proposed rule, "Ozone and related pollutants have long been recognized, in both clinical and epidemiological research, to affect public health." In fact, two major medical research studies in 2004 linked ozone to premature death.[38]

Dudley, meanwhile, argued that ground-level ozone is actually beneficial, repeating the instantly-discredited[39] claim that it protects us from skin cancer.[40]

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[36] *Id*. at 5.

[37] *See* Dudley, *supra* note 5, at 11.

[38] *See* M.I. Bell, A. McDermott, S.L. Zeger, J.M. Samet & F. Dominici, *Ozone and Short-term Mortality in 95 US Urban Communities, 1987 to 2000*, 292 JAMA 2,372 (2004). *See also* A. Gryparis, B. Frosberg, K. Katsouyanni et al., *Acute Effects of Ozone on Mortality from the "Air Pollution and Health: A European Approach" Project*, 170 AM. J. RESPIRATORY & CRIT. CARE MED. 1080 (2004).

[39] *See* T.H. Watkins, *Pollution Can Save Your Life*, N.Y. TIMES, June 17, 1997, at A21 (dismissing the Dudley/Mercatus/industry claim).

[40] *See, e.g.*, Susan E. Dudley, *Ozone NAAQS Comments: Comments on the U.S. Environmental Protection Agency's Proposed National Ambient Air Quality Standard for Ozone*, at ES-1 (Mar. 12, 1997) ("EPA's proposal may *harm* public health and welfare,

Dudley also argued that there was not enough information to justify the regulation. In her opposition statements, Dudley argued that while "EPA has a responsibility for setting [National Ambient Air Quality Standards for Ozone] that protect public health and welfare,"[41] EPA's evidence of a problem was too limited, showing only "health threats to certain individuals with pre-existing respiratory conditions in a few urban areas on certain summer days when atmospheric conditions combine to create elevated ozone levels."[42] (In other words, a minority of poor, inner-city children with asthma.)

Dudley frequently makes the case that agencies have not provided enough information to prove the need for a regulatory protection. For instance, the Army Corps of Engineers issued a proposed rule that would limit the use of a single nationwide permit (NWP) for contractors seeking to build on wetlands. The regulation would increase the scenarios under which more specific, in-depth analysis was required before such permits could be issued. The measure would help to ensure that building projects would limit the possible negative impact on surrounding aquatic life.

Dudley opposed the regulation, claiming that the Army Corps of Engineers needed substantially more information before it could justify the change. Dudley suggested that the Corps provide copious additional analysis including "an analysis of the extent of acreage affected by its proposed revisions, as well as the benefits and costs expected from the modifications" and "examin[ation of] alternative approaches to protecting valuable wetlands, including those that rely on private incentives and state and local controls."[43] Dudley also recommended that the Corps

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regardless of cost. For example, the potential for a change in the ozone standard to increase people's exposure to ultraviolet radiation raises serious questions about the net health and welfare effects of this proposal. Taking into consideration the beneficial screening effects of ozone on ultraviolet radiation, we estimate that the impact of attaining the proposed standard would be to *increase health risks by over $280 million per year*."); *id*. at II-10 ("*The proposed change in the ozone standard will increase malignant and non-melanoma skin cancers and cataracts, as well as other health risk from ultraviolet radiation*.") (emphasis in original).

[41] Susan E. Dudley, *Testimony Before the Subcomm. on Clean Air, Wetlands, Private Property & Nuclear Security of the Senate Comm. on Envt. & Pub. Works*, April 24, 1997, at Exec. Summ. § A, available at <http://epw.senate.gov/105th/dud_4-24.htm>.

[42] Dudley *et al*., supra note 33, at A-3.

[43] *See* Susan E. Dudley, *ACE Nationwide Permits Comments: Comments on the Army Corps of Engineers' Proposal to Issue and Modify Nationwide Permits* 4 (Nov. 30, 1998), *available*

examine "the burden the increased case-by-case review will have on its own resources, as well as the increased delays and costs that will be borne by landowners. In addition, the Corps should articulate and quantify the benefits expected from reducing reliance on NWPs. It must address the question of what negative impacts have been attributed to NWPs, and how those impacts would be avoided with the proposed modifications."[44] And if this wasn't enough, Dudley also asked that the Corps "present for public discussion estimates of the increased Corps budget requirements, increased permitting delays, and expected benefits of the proposed floodplain exclusion."[45] Though Dudley complained that the case-by-case permit reviews will take more time and resources, she put forward a swath of suggestions for further analysis needed before the Corps can act.

Dudley demands a degree of scientific certainty that would require any situation to become truly dire before an agency could act, even in cases when scientific evidence clearly justifies intervening sooner. Consider, for example, her comments regarding EPA's efforts to develop its "fish kill rule" — standards to protect the trillions of fish and other aquatic life destroyed annually by industrial plants that suck in water from natural bodies of water to cool their systems. Dudley essentially argued that it is not enough that EPA can show that the population of fish are significantly depleted by cooling water intake systems; rather, she believes we have to wait until the fish population is depleted enough to cause a rise in the price of fish.

In multiple comments to EPA, Dudley opposed an EPA survey to collect information on the public's "willingness to pay" to save fish. Instead, Dudley argued, "if fish are being as rapidly depleted as the EPA suggests, we should see their per-pound price rising proportionately to reflect the rising scarcity. Such scarcity would clearly be captured in use values, and would unlikely be measured in a survey."[46] In Dudley's sophistic view, the only value that a fish has is monetary

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at <http://mercatus.org/repository/docLib/MC_RSP_PIC1998-03_USACoE-Wetlands_981130.pdf>.

[44] *Id*. at 5.

[45] *Id*. at 7.

[46] Susan E. Dudley & Daniel Simmons, *Fish Kill WTP Reply: Reply to the Environmental Protection Agency's Response to Mercatus Center Willingness to Pay Survey: Phase III Cooling Water Intake Structures* 2 (April 25, 2005), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2005-04EPACVSurvey_050425.pdf>.

and the government has no justification for protecting fish until they are practically extinct.

As any high school biology student might have guessed, not all fish that are of environmental significance are marketed as food (or another product), and threats to the population of fish that are sold for food can manifest long before there are any market effects. "Boom and bust" relationships in ecosystems often mean that population depletion in fish and other species lower in the food chain can produce a sudden and severe depletion in larger species, where the diminution will not be noticed until it is far too late. By her logic, an agency would have to wait for the death of an ecosystem, an epidemic of foodborne illness, or the widespread emergence of a rare cancer associated with a probable carcinogen before it would be allowed to step in and regulate.

Leaving It to the States

When all else fails, Dudley trots out a killer argument: regulation is someone else's job — namely, the state and local governments. Dudley's stark choice between federal and state regulation is mostly fictional. In the typical case, federal standards are not the only available protective standards: in the absence of preemption, federal standards are minimum standards that guarantee a basic level of protection that individual states are free to exceed with their own, higher levels of protection. The result is that federal standards set a floor for safeguards, and the states elect to set their own ceilings.

There are many well-established reasons for this federal role and not leaving the entire job of public protection up to the states. Among others: the existence of a national marketplace, beyond the capacity of any single state or local government to regulate; the comparatively weaker capacity in state and local governments to research the scientific basis for needed standards; the existence of problems, such as air pollution, that transcend state borders; and the threat of a race to the bottom, in which states vying for a corporation's decision to site its plants compete by lowering the levels of protection afforded to workers, the public, or consumers.

These well-known rationales are all conspicuously absent from Dudley's writings. Dudley has repeatedly claimed that regulations are not warranted because the federal government is not in the best position to impose a regulation and that, instead, regulating should be left completely to state and local governments. Some examples:

- Commenting on the arsenic rule, Dudley dismissed the agency's ability to make judgment calls on matters of public health: "While [EPA] should share information about arsenic levels and hazards, it should not impose its judgment, based on national average costs and benefits, on individual communities as to how best to invest in their own public health."[47]

- About the regulation for Tier 2 motor vehicle emission standards, Dudley claimed that "[g]iven state and regional track records for instituting necessary controls[,] EPA should leave decisions regarding the sulfur content of gasoline to individual states . . . ."[48]

- The regulation controlling toxic runoff from animal feed provides another striking example: "While EPA does report incidents that reveal . . . water quality

[47] Dudley *et al.*, *supra* note 33, at A-8. See also Susan E. Dudley, *Arsenic Comments: Public Interest Comment on the Environmental Protection Agency's Request for Comments on National Drinking Water Regulations for Arsenic* 8 (Oct. 31, 2001), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2001-14EPA-Arsenic_011031.pdf> ("[I]t is important that EPA recognize the variation in costs and benefits across systems sizes, and regions of the country. While it should share information about arsenic levels and hazards, it should not impose its judgment, based on national average costs and benefits, on individual communities as to how best to invest in their own public health.").

[48] Dudley *et al.*, *supra* note 33, at A-3. *See also* Susan E. Dudley & Wendy Gramm, *EPA Speeds Ahead With Ill-Conceived Vehicle and Gasoline Standards*, REPUBLICAN AMERICAN, Dec. 20, 1999, *available at* <http://mercatus.org/publications/pubID.2661/pub_detail.asp> ("Our recommendation is that this issue be addressed not by EPA, but by the states or regional councils, such as the Ozone Transport Assessment Group (OTAG), which have been remarkably successful at designing innovative solutions to their own pollution problems."); Susan E. Dudley, *Tier 2 Standards for Ozone NAAQS Compliance: Comments on EPA's Provision of Supplemental Information and Request for Comment Regarding Attainment of the 1-hr Ozone NAAQS Standard in Support of Proposed Tier 2 Vehicle Emissions and Gasoline Sulfur Standards*, *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC1999-11_EPA-Tier2_991201.pdf>, at App.1-1 ("[G]round level ozone concentrations that exceed the NAAQS are regional problems, which do not justify a federal solution.").

> problems in certain watersheds [caused by factory farms], these do not support uniform nationwide regulation."[49]

Perhaps the most interesting example is the roadless area conservation rule (to protect certain wild areas of national forests by keeping them "roadless"), about which Dudley insisted, "The Forest Service has failed to show that a blanket, nationwide prescription is needed for roadless lands."[50]

If it is not the federal role to establish national standards for *national forests owned by the federal government*, it is unclear what, if any, reason would justify federal regulation for Dudley.

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[49] Dudley *et al*., *supra* note 33, at A-20.

[50] *Id*. at A-4.

Case in Point: Dudley's Impossible Requirements in Action

Dudley's commitment to disproving regulation is obvious through her inconsistent and often contradictory statements and analytical methods. She applies criteria only when they are convenient to debunking regulation or weakening public protections. Intellectually incoherent, the only consistency is her unrelenting hostility to regulation. Case in point: her views of the public's ability make its own choices.

The public's ability to make its own rational decisions is the crux of the Dudleynomics version of public choice theory. It is the background assumption that makes possible the rhetorical legerdemain mentioned above[51] in which the need for regulation is the proof that we do not need a regulation. For example, as she argued when deriding a fuel economy increase for light trucks as the "worst rule of 2003," "[the National Highway Transportation Safety Administration] continues to force vehicle manufacturers to achieve higher miles per gallon than the market would offer, or consumers would choose, in the absence of the regulation."[52] Dudley dismissed NHTSA's finding of net benefits from the increase, writing, "We know this must be false, because any regulatory constraint that forces consumers away from their preferred choices must have negative net benefits (i.e., make Americans worse off)."[53]

In addition to using this background assumption as a basis for criticizing regulations, Dudley has also used it to form alternatives to regulations: instead of regulating, why not give the public information, and let it make choices?

For instance, Dudley opposed a NHTSA regulation requiring advanced air bag technology, claiming that NHTSA could never have enough information to justify the need for advanced air bag technology in automobiles: "[R]egardless of how sophisticated NHTSA makes its tests, or how sophisticated manufacturers make air bags, this one-size-fits-all approach will not meet the preferences or protect the safety *of all consumers under all conditions*."[54] Instead, Dudley argued

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[51] *See* pages 16-19 *supra*.

[52] WASH. POST, Dec. 29, 2003, *available at* <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contented=A40140-2003Dec29&notFound=true> (last accessed Feb. 8, 2006).

[53] *Id*.

[54] *See* Dudley, *supra* note 2, at 1 (emphasis added).

that NHTSA should provide consumers with information on the benefits and potential problems with various air bag technologies and then let consumers decide whether to buy automobiles with advanced air bag technology: "Rather than requiring air bags to pass additional elaborate crash tests, which can never fully reflect real world conditions, NHTSA should consider options that allow informed consumers to make their own personal risk tradeoff decisions."[55]

Dudley also proffered informed consumer choice as the alternative to a regulation intended to reduce smog-related health hazards by reducing ground-level ozone. Testifying before Congress against EPA's standards, she insisted that "public health advisories and other [geographically] targeted approaches may be an effective alternative to standard setting" and that "an expanded air pollution warning system [should] be initiated so that sensitive individuals can take appropriate 'exposure avoidance' behavior."[56] In other words, the public should be informed of days when ozone-related health risks are at their highest, and then choose to stay indoors. (Where, incidentally, Dudley believed poor asthmatic children are probably being exposed to the pest droppings that induced their ailments in the first instance.[57])

Although she has advocated giving information to the public as an alternative to regulation, she has actively opposed agency proposals to do just that. Her argument: that the public is too irrational to make sound choices based on the information.

For example, Dudley opposes requiring industry to provide information on toxic releases and chemical hazards. Dudley opposed regulations to increase reporting requirements under the Toxic Release Inventory, claiming that the general public was too ill-informed to make good use of such information. On a rule that would have required more reporting of lead and lead compounds, Dudley

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[55] *Id.*

[56] *See* Dudley, *supra* note 41.

[57] *See id.* ("While asthma is a disturbing health problem, particularly since (a) reported cases have been increasing in recent years (45 percent in the last decade), (b) one-third of its victims are children, and (c) it is most severe among the urban poor, this trend cannot be explained by ozone levels; air quality has been improving over the last decade and ozone levels in particular declined 6 percent between 1986 and 1995. Recently, the National Institute of Allergy and Infectious Diseases funded a study that revealed that 'the leading cause of asthma by far was ... proteins in the droppings and carcasses of the German cockroach.'").

wrote, "Even if we determine that information on the release of certain chemicals has a net social value, we cannot assume that more frequently reported information, or information on a broader range of chemicals, would be *more* valuable. Only when the social costs of information are weighed against the social benefits can a determination be made regarding what and how much information is optimal."[58]

Any such cost-benefit analyses of TRI information would likely fail the Dudleynomics test of market failure. As Dudley argues, "Information is a good, and like other goods, it is costly to produce. Markets generally function well at determining the optimal level of production for different goods, including information. Absent some market failure that results in a sub-optimal production of information, a federal mandate requiring the production of information is likely to divert scarce resources from other, more valued, social goals."[59]

Never mind that since the TRI program began in 1988, disposal and releases of TRI chemicals have decreased by 57 percent. These reductions include decreases in the release of chemicals hazardous to human health such as lead, mercury, dioxin, and other persistent bioaccummulative toxic (PBT) chemicals.[60] Instead, such results may actually be signs of irrational behavior: "Even if the information TRI provided conveyed important information on potential risk, *the recipients of the information may not interpret it correctly or rationally*."[61]

Dudley also opposed regulations that would require chemical and industrial facilities to provide public information about the worst case scenarios that could arise if chemicals or toxic substances were accidentally released. Dudley insisted that this information "is unlikely to be of any public value."[62] Dudley's proof: the

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[58] Susan E. Dudley, *TRI Lead Comments: Comments on the Environmental Protection Agency's Lead and Lead Compounds; Lowering of Reporting Thresholds; Community Right-to Know Toxic Chemical Release Reporting; Proposed Rule* 3 (Dec. 15, 1999), available at <http://mercatus.org/repository/docLib/MC_RSP_PIC1999-13_EPA-TRI_991215.pdf>.

[59] *Id.* at 6.

[60] *See* EPA, "TRI Public Data Release eReport: Summary of Key Findings" 16 (April 2006), *available at* <http://epa.gov/tri/tridata/tri04/ereport/KeyFind.pdf>.

[61] Dudley, *supra* note 58, at 3 (emphasis added).

[62] Susan E. Dudley & Daniele Schiffman, *RMP Comment: Public Interest Comment on EPA's and DOJ's Proposed Distribution of Off-Site Consequence Analysis Information* 11 (June 8, 2000), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2000-12EPADOJ_Off-siteInfo_000608.pdf>.

public had not already demanded it. Dudley also whipped out the catch-all argument for government secrecy after September 11: that TRI amounted to "terrorist right to know."[63] Of course, Dudley did not stop there: she argued that our right to know is a right that we do not have the intellectual capacity to exercise. "How will knowing the physical state and concentration of a chemical educate and inform people if they do not know what the chemical is?" Dudley asked. "How does knowing the statistical model, assumed atmospheric conditions, and duration of release inform someone who does not know the chemical involved, or the outcome hypothesized?"[64] Her answer: it does not inform the public. Dudley approvingly quoted a research paper finding that, "[g]iven different information on potential environmental risks from hypothetical industrial facilities, participants in the experimental analysis systematically believed — and made irrational choices based on — the worst-case scenario presented, regardless of information source, and despite careful caveats as to actual expected risks."[65]

While these positions seem inconsistent prima facie, there is a certain logic to Dudley's approach. If the information forces greater disclosure and accountability from industry, then Dudley isn't interested. But if the need for more information can delay action by federal agencies, then Dudley claims more information is the answer we need.

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[63] *See* Susan E. Dudley, *It is Time to Reevaluate the Toxic Release Inventory: Testimony before Subcomm. on Reg. Reform & Oversight of House Comm. on Small Bus. on "The TRI Lead Rule: Costs, Compliance, and Science"* (June 13, 2002), *available at* <http://mercatus.org/repository/docLib/20060804_RSP _Dudley_Testimony_TRI_020613.pdf>. *See also* Susan E. Dudley, *Terrorist Right-to-Know?*, Nov. 1, 2001, at <http://mercatus.org/publications/pubID.2629/pub_detail.asp>.

[64] Dudley & Schiffman, *supra* note 62, at 8-9.

[65] *Id*. at 8.

Dudley's Radical Ideas

If she is confirmed to head the Office of Information and Regulatory Affairs, Susan Dudley will be in a position not just to interfere with specific regulations as they go through the rulemaking process but also to develop government-wide policies that could undermine the federal government's very capacity to protect the public. The most recent occupant of that office, John Graham, used his power to develop a number of government-wide policies to undermine health and safety protections with procedural minutiae:

- A circular standardizing cost-benefit analysis and calling for cost-effectiveness analysis — two tools that, in Graham's hands, have been used to tilt the rulemaking process in favor of corporate special interests;[66]

- Guidelines for burdensome "peer review" to delay the release and circulation of important scientific information;[67]

- New requirements for general policy statements, interpretations, and guidance to the public, which will result in the public being left in the dark about important agency matters;[68] and

- A one-size-fits-all straightjacket on risk assessments and other risk-related assessment activities, which will continue the Bush administration's agenda of tainting science with special interest politics.[69]

Through government-wide policies such as these, OIRA complements its rule-by-rule oversight with across-the-board distortions of the regulatory process itself,

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[66] *See* Circ. A-4, Sept. 17, 2003, *available at* <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.

[67] *See* OMB, FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW, Dec. 16, 2004, *available at* <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf>.

[68] *See* OMB, PROPOSED BULLETIN FOR GOOD GUIDANCE PRACTICES, Nov. 23, 2005, *available at* <http://www.whitehouse.gov/omb/inforeg/good_guid/good_guidance_preamble.pdf>.

[69] *See* OMB, PROPOSED RISK ASSESSMENT BULLETIN, Jan. 9, 2006, *available at* <http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf>.

which can burden, weaken, and delay the development of all kinds of needed public safeguards.

Dudley comes to this nomination with an agenda of her own. We know from her many writings and other public pronouncements that she takes a dim view of the federal role in protecting the public. We also know that, like Graham before her, Dudley has a radical vision for distorting regulatory policy in ways that serve corporate special interests at the public's expense. The following are some of Dudley's dangerously radical ideas.

Regulatory Sunsets

How could a "sunset" be a bad idea? Look no further than Susan Dudley's radical vision of "regulatory sunsets." The basic concept of regulatory sunsets is that all the protective standards on the books — all of them, ranging from the ban on lead in gasoline, to safeguards against arsenic and other poisons in the drinking water, to protections for miners as they engage in their dangerous work — should be given mandatory expiration dates. At the end of that drop-dead date, an agency would have to stop everything and prove the case for that regulation yet again, or else it would be stripped from the books.

Even though we know, for example, that the ban on lead in gasoline is a proven protection that has prevented vulnerable children from losing IQ points, Dudley would put that safeguard at risk with regulatory sunsets. In her own words:

> [W]e have to . . . look back at that 20 feet of shelf space [dedicated to the Code of Federal Regulations]. Are all those regulations still necessary? Are they having their intended effects? Are they outdated? If not, it's time to start thinking about ways to revise them. One way to do that would be through sunset provisions, which would shift the burden of proof for those existing regulations and require us to demonstrate that they're still needed.[70]

[70] Susan Dudley, White House Economic Conference, Panel on Tax and Regulatory Burdens, Dec. 15, 2004, *formerly archived online at* <http://www.mercatus.org/video/041215-dudleytestimony.ram> (now removed from Mercatus website).

Note that apparent slip of the tongue: "Are they outdated? *If not*, it's time to start thinking about ways to revise them." It may be even more revealing of Dudley's agenda than any affirmative declaration.

Forcing agencies to re-justify all the rules on the books would be an enormously wasteful enterprise that would leave them little or no time to look forward, to the unmet needs for protection that need to be addressed. There is nothing inherently wrong — and much worth applauding — about agency efforts to collect data on continuing and emerging problems, including assessing whether regulatory safeguards actually are addressing the public's needs. A mandate for regulatory sunsets, however, would be a one-size-fits-all edict, sweeping in not only rules worth assessing but also rules for which there is no legitimate question of their value. Moreover, sunsets are entirely unnecessary: the public already has the option of identifying rules that are out of date and bringing them to the agencies' attention through petitions for rulemaking under the Administrative Procedure Act. The virtues of continuing to rely on the APA process include turning to the public to focus attention on the rules worth addressing instead of forcing agencies to plow through every single rule they have ever issued, as well as offering a vehicle that is neutral to more or less regulation (given that petitions for rulemaking can be used to demand new rules in addition to revisions or eliminations of existing rules), as opposed to the one-way ratchet of regulatory sunsets.

Additionally, regulatory sunsets raise the difficult question of timing. What time is the right time to force a regulation to plead for its life? In the case of air bags, for example, the early response from auto makers was fatally inept, but the evidence from that period was immediately used as fodder for junk science pieces arguing against the value of air bag requirements.[71] Even absent the intervening malfeasance of recalcitrant manufacturers, auto safety requirements can take as long as ten years after a regulation's effective date to be fully realized in vehicles on the road, given the general rate at which people retire their vehicles in favor of new ones — and the effective date can itself be some time off from the publication of a rule, in order to give manufacturers time to gear up for the new requirement.

Whatever the time horizon, regulatory sunsets would be at odds with precautionary protections. The very purpose of precautionary regulations is to address potential harms before they manifest. Agencies under the gun of a

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[71] *See, e.g.*, Kimberly M. Thompson, Maria Segui-Gomez & John D. Graham, *Validating Benefit and Cost Estimates: The Case of Airbag Regulation*, 22 RISK ANAL. 803 (2002).

regulatory sunset deadline to defend and re-justify a precautionary standard could be forced into the impossible situation of having to prove a negative.

Regulatory sunsets could not be implemented by executive fiat (even if such separation-of-powers concerns have not troubled Graham much in recent years). Still, a bill offered in both the House and Senate during the 109th Congress would take current law and advance it incrementally in the direction of regulatory sunsets.[72] Moreover, during the House's consideration of bills to create sunset commissions (sunset dates not for regulations but for programs in their entirety), the House Committee on Government Reform reported out one bill with language adding regulatory sunsets.[73] If Dudley is confirmed, she would undoubtedly apply the political pressure of the White House to promote legislative developments for regulatory sunsets, which she would enforce with zeal.

Regulatory Rationing

Dudley has also promoted the radical idea of rationing the government's ability to produce protective standards that the public needs. Dudley would impose "regulatory budgets": fictional budgets of industry compliance costs, with a cap. Once an agency has hit its cap, it would be forced to stop promulgating any new protective standards, no matter how great the need.

Others before Dudley have advocated regulatory budgets. Dudley's modest contribution to the corporate-sponsored campaign for these rationing tools is a rhetorical one: importing language from fiscal policy debates. As Dudley recently explained, her approach is

> to treat regulatory expenditures in a manner similar to on-budget expenditures. I keep using this analogy to federal spending. For federal spending to be dedicated, Congress

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[72] Two bills would amend the Regulatory Flexibility Act, which requires agencies to periodically review regulations promulgated since passage of the RFA with a significant economic impact on a substantial number of small entities, by expanding the scope of those reviews to cover all regulations on the books and explicitly forcing agencies to consider whether or not the rules are still needed. *See* Regulatory Flexibility Improvements Act, H.R. 682; Regulatory Flexibility Reform Act, S. 1388.

[73] *See* Government Efficiency Act of 2006, H.R. 5766 (post-markup version available at <http://www.ombwatch.org/regs/2006/sunset-hr5766-markup.pdf>).

> has to first authorize an activity and then appropriate the necessary resources. For regulatory spending (the compliance costs to all of us as consumers, and workers, and employers), it's authorized in statute, often in broad terms, but then there are no limits on the spending. Congress could make regulations more accountable by adding that element to the statute — to regulatory statutes.[74]

In Dudley's world, regulatory protections are best understood as "off-budget costs" that need to be reined in, just as "on-budget" costs can be.

Dudley's mangled analogy betrays a misunderstanding of the fiscal policy from which she has borrowed these terms. The term "off-budget" refers to entitlements and other government spending excluded by law from budget caps, pay-as-you-go, sequestration, and other elements of the federal budget process.[75] The Congressional Budget Office gives the following definition:

> Spending or revenues excluded from the budget totals by law. The revenues and outlays of the two Social Security trust funds (the Old-Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund) and the transactions of the Postal Service are off-budget. As a result, they are excluded from the totals and other amounts in the budget resolution and from any calculations necessary under the Deficit Control Act.[76]

So, although Dudley has taken the phrase "off-budget" from fiscal policy discourse, she has misunderstood it entirely. "Off-budget" costs are not expenditures that have failed to be accounted for; they are, instead, entitlements, like Social Security and Medicaid, which have dedicated funding streams and a trust fund from years of surplus income and thus need not be included in the regular annual budget.

Dudley's gaffe reveals an even more significant misunderstanding. Regulatory protections of the public health, safety, civil rights, environment, and

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[74] Dudley, White House Economic Conference, *supra* note 70.

[75] *See* OMB Watch, *Glossary of Important Budget Terms*, *available at* <http://www.ombwatch.org/article/articleview/1932/1/197/>.

[76] CBO, *Glossary of Budgetary and Economic Terms*, *available at* <http://www.cbo.gov/showdoc.cfm ?index=3280&sequence=0>.

other public interests are not a species of fiscal activity, meaningful only in terms of the costs imposed on corporate special interests when the federal government finally forces them to do the right thing as corporate citizens. They are, instead, *entitlements* in the truest sense of the word. Through the democratically-controlled federal government, the public pools its resources to create institutions and policies strong enough to counter the forces we are otherwise powerless to face as isolated individuals. FDR explained it best in a July 1933 fireside chat: "It goes back to the basic idea of society and of the nation itself that people acting in a group can accomplish things which no individual acting alone could even hope to bring about." In the face of harmful pollution, unsafe products released into the national marketplace, and other hazards that corporate special interests expose us to without otherwise being forced to internalize the attendant public costs, we are entitled to regulatory safeguards. Our government owes us nothing less.

Aside from being morally and politically obtuse, regulatory budgeting runs into the problem of how to actually measure the industry compliance costs that would feed the fictional "budgets." For a regulation that is not yet on the books, agencies produce *ex ante* estimates of the costs that industry will bear by asking for estimates from the soon-to-be-regulated industries (which have clear incentives to inflate the numbers), often using biased samples of industry representatives, failing to anticipate technological innovations that will drive down actual costs, and making other conservative assumptions that routinely overestimate actual compliance costs significantly.[77] A recent major study of compliance cost estimates has revealed that these *ex ante* estimates are systematically biased in an upward direction.[78] Agencies forced to work within these "budgets" would be arbitrarily forced to stop protecting the public long before companies had actually expended the amounts allocated, given the routine inflation of *ex ante* estimates.

Moreover, the use of cost estimates as dispositive factors in policy decisions ignores a crucial equity consideration: not all costs have the same moral or ethical value. Some regulatory costs represent the cost to industry of what it should have done as a good corporate citizen in the absence of regulation. Compliance cost estimates, already suspect, become even more meaningless if they are not offset by

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[77] *See* Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2030-33 (2002).

[78] *See* RUTH RUTTENBERG & ASSOCS., PUBLIC CITIZEN, NOT TOO COSTLY AFTER ALL: AN EXAMINATION OF THE INFLATED COST-ESTIMATES OF HEALTH, SAFETY, AND ENVIRONMENTAL PROTECTIONS (Feb. 2004), *available at* <http://www.citizen.org/documents/Not%20Too%20Costly.pdf>.

the illicit profits earned by companies (such as a factory illegally dumping hazardous toxic waste, or an auto company aware that strengthened car roofs are key to preventing injuries and saving lives in rollover crashes all the while telling government and public the opposite[79]) during the time that they knew of the harms they were creating but failed to act. Dudley's moral world, the world of regulatory budgeting, is a depraved one in which industry can knowingly expose the public to grave harms, enjoy the financial benefits of failing to take the steps necessary to protect the public, and then use compliance costs — the costs of finally doing the right thing — as a shield against being forced to comply with new protective standards.

Dudley's radical vision has antecedents in legislative proposals. After the failure of the anti-regulatory components of the Contract With America, corporate special interests have prodded some members of Congress to back a measure that comes just short of regulatory budgeting by calling for a pilot study of regulatory budgeting, which OIRA would implement in several key agencies (such as the Environmental Protection Agency, Food and Drug Administration, and Occupational Safety and Health Administration). The evidence from Dudley's public statements is that she would back such proposals and then implement the resulting "pilot study" in ways that would put the public at risk.

More Costs, Fewer Benefits

Her insistence on making industry compliance cost estimates the crux of regulatory policy informs other radical ideas that would sink the federal government into a mire of endless analysis and meaningless justifications for failing to protect the public.

The End of "Safety First" Laws

For example, Dudley has called for Congress to dramatically reorder the nation's protective priorities by embedding cost considerations in all laws that authorize agencies to protect the public, even some laws that Congress has declared

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[79] *See* Press Release, Public Citizen, "New Report on Auto Industry Data Shows Automakers Misled NHTSA and Public When Denying Link Between Roof Strength and Injuries" (March 30, 2005), *available at* <http://www.citizen.org/pressroom/release.cfm?ID=1909>.

should be "safety first" laws.[80] In some of these laws, such as the laws that establish the Mine Safety and Health Administration and the Occupational Safety and Health Administration, Congress has forbidden the use of cost-benefit analysis in decision making.[81] In others, even if cost-benefit analysis is not explicitly forbidden, Congress has nonetheless called upon the agencies to put a thumb on the scale in favor of safety.[82]

Dudley's hostility to precautionary laws is particularly noteworthy given that the Mine Safety and Health Administration is currently working on several new regulations to protect miners.[83] Congress required these new rules in the aftermath of the Sago mine disaster, as the public became aware that the tragedy could have been averted or at least mitigated had the Bush administration not abandoned work on several regulatory safeguards planned by previous administrations.[84] Although there is nothing Dudley can do to amend MSHA's statutory authority by herself, she can nonetheless exert tremendous influence over the resulting regulations. Her hostility to safety-first laws and her blind devotion to minimizing industry compliance costs should give miners and all other members of the public cause for concern.

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[80] *See* Dudley, White House Economic Conference, *supra* note 70 ("But there are still regulatory statutes that prohibit the agencies from examining the full impacts of regulation. Congress should correct these statutes and stop putting blinders on agencies, to make sure that they can do their job.").

[81] *See, e.g.*, *American Textile Manufs. Inst. v. Donovan*, 452 U.S. 490 (1981) (interpreting OSH Act to forbid cost-benefit analysis).

[82] *See, e.g.*, *Public Citizen v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003) ("[W]hen NHTSA issues standards under the Safety Act, *State Farm* requires that the agency weigh safety benefits against economic costs; moreover, *State Farm* instructs the agency to place a thumb on the safety side of the scale.").

[83] *See* Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493.

[84] For information about the items eliminated from MSHA's rulemaking agenda which were implicated in the Sago tragedy, see Robert Shull, *Failing to Protect the Public: Mine Safety & Beyond*, REG•WATCH, Jan. 21, 2006, *available at* <http://www.ombwatch.org/article/blogs/entry/1452/6>.

Telling Us More about Costs (But Not Benefits)

Dudley repeatedly insists that the benefits of regulations are better understood, qualitatively if not quantitatively, than the costs.[85] Accordingly, she has proffered several radical proposals that would consume vast amounts of taxpayer dollars on navel-gazing analyses that would increase the reported estimates of regulatory costs while doing little to inform the public about the life-saving benefits of sensible safeguards. Among her proposals:

- *Analysis of the analysis of the analysis.* Dudley has proposed that OIRA get in the business of producing an annual report card for agencies,[86] assessing their cost-benefit analyses of proposed rules for the quality of the analyses (and presumably judging them against one-size-fits-all criteria, applicable whether the agency is evaluating a standard for drinking water or an auto safety improvement[87]).

- *Convert the annual report on regulatory costs and benefits into a detailed report on regulatory … costs.* OIRA is charged with presenting an annual report on the costs and benefits of regulations. Dudley has taken issue with this "regulatory accounting report," arguing that OIRA has not done *enough* to present the costs of regulations. Accordingly, Dudley has counseled that OIRA should present as robust a picture of costs as possible, even presenting a picture of the costs for rules for which benefits have not been similarly quantified.[88] Given the enormous

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[85] *See, e.g.*, Dudley, *supra* note 5, at 9 ("The desired benefits of regulations are the force behind legislative initiatives that create them, and these desired benefits of regulations are often better understood, qualitatively, at least, than the costs.").

[86] *See id.* at 12.

[87] *See id.* (decrying OIRA's failure to provide "independent verification or any assurance that assumptions and methods are consistent across programs and activities").

[88] *See id.* ("OMB should not limit its totals to rules for which agencies estimate both costs and benefits. It should also present Congress a review of other reliable estimates of regulatory impacts").

difficulty of quantifying the benefits of regulation, which can include such abstract but quite real benefits as equity, civil rights, and the preservation of an interconnected ecology, Dudley's proposal would feed industry's anti-regulatory propaganda by presenting a skewed, cost-heavy picture of regulatory protections.

- *Require OIRA to conduct independent assessments of regulatory costs and benefits.* The annual report mentioned above essentially presents annual totals derived from agency estimates. Dudley has called upon OIRA to go even further: to second-guess the agencies, and independently estimate costs and benefits of proposed regulations.[89] Doing so would open the door to having OIRA do so during the rulemaking process itself, when agencies are preparing the analyses they will use to justify their policy decisions. Given Dudley's penchant for producing cost estimates far in excess of any government estimate,[90] it seems likely that a Dudley-helmed OIRA would supplant agency estimates with assessments that undermine the case for new regulations.

- *Create yet another entity for regulatory reviews.* Having OIRA assert extralegal authority over the regulatory process is not enough for Dudley. She has proposed that yet another entity be created, above or alongside OIRA, to review and analyze regulations. Dudley has testified that "[i]t is not clear that the

[89] *See* Susan E. Dudley, *Testimony on Regulatory Accounting Before the House Subcomm. on Energy Policy, Natural Resources & Reg. Affs.* 3 (Feb. 25, 2004) (calling on OIRA's annual regulatory accounting report to "reflect an independent assessment of regulatory costs and benefits, and not simply provide a summation of agency estimates"), *available at* <http://mercatus.org/repository/docLib/20060809_Dudley_House_Subc_Energy_NR_Reg_Aff_on_Reg_A_Feb_25_2004.pdf>.

[90] For example, Dudley has suggested that OIRA's estimate of the costs of regulations could be too low "by a factor of 20." Dudley, *supra* note 5, at 7. *See also, e.g.*, Appendix E, "Dudleynomics in Action."

> Office of Information and Regulatory Affairs, from its location within the Executive branch, is in a position to provide the necessary check or independent assessment of costs and benefits."[91] Dudley suggests instead that Congress establish a "Congressional or other outside review body . . . to report benefits and costs honestly and without deliberate bias."[92]

Return of the Senior Death Discount

Although she believes that benefits of regulations are better understood than costs, Dudley has proposed methods that would ensure we understand much less about those benefits. The prevailing practice in cost-benefit analysis of assigning a dollar value to human life when calculating benefits is *ab initio* problematic,[93] but Dudley would make the practice even more morally questionable by implementing a senior death discount that counts the lives of seniors as less than the lives of the young.

In formal comments submitted to the Environmental Protection Agency criticizing stricter standards for arsenic in the drinking water (standards Dudley dismissed as "an unwelcome distraction"[94]), Dudley argued that "EPA's value [per statistical life] likely overstates the benefits of the rule. . . . This can be addressed with sensitivity that estimates benefits based on a value per life-year saved, or an age-adjusted value per life."[95] Here, Dudley calls for essentially two kinds of senior death discounts:

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[91] Susan E. Dudley, *Testimony before the House Committee on Small Business, Subcommittee on Regulatory Reform and Oversight, "Reforming Regulation to Keep America's Small Businesses Competitive"* 8 (May 20, 2004).

[92] *Id.*

[93] *See generally* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

[94] Susan E. Dudley, *How Not to Improve Public Health*, Jan. 11, 2001, *available at* <http://mercatus.org/publications/pubID.2630/pub_detail.asp>.

[95] Susan E. Dudley, *Arsenic Comments: Public Interest Comment on the Environmental Protection Agency's Request for Comments on National Drinking Water Regulations for Arsenic* 4 (Oct. 31, 2001), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2001-14EPA-Arsenic_011031.pdf>.

- *"value per life year saved"* — Agencies estimating the benefits of a proposed new regulatory safeguard could choose to calculate either the number of *lives* saved or, alternatively, the number of *life years* saved. If 1,000 people were saved by a new safeguard, then an agency estimating *lives* would count all 1,000 people equally. An agency estimating *life years*, however, would look at those 1,000 people and count up how many years each person has to live, on average, so that someone with only 10 years left would count for much less than someone with 70 years left.

- *"age-adjusted value per life"* — Even if agencies chose to count lives rather than life years, the trick with this second kind of senior death discount would happen when the lives were converted to dollars. Based on studies, now discredited,[96] that seniors were less willing to pay to reduce mortality risks, the agency following Dudley's advice would assign a lower cash value to the lives of seniors than to the lives of the young.

After enormous public outcry about EPA adopting a senior death discount, Congress forbade government agencies from using funds toward calculating "monetary values for adult premature mortality that differ based on the age of the adult."[97]

The other possible senior death discount — using life-year methods to estimate benefits of proposed health, safety, and environmental regulations — has not, however, been forbidden. Exercising the extralegal powers Graham asserted before her, Dudley could force agencies to adopt this form of senior death discount. The result would be analytical games that bias the rulemaking process against protections that benefit highly vulnerable populations, such as the elderly.

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[96] *See* Cindy Skrzycki, *Under Fire, EPA Drops the 'Senior Death Discount,'* WASH. POST, May 13, 2003, at E1 (summarizing the controversy).

[97] Transportation, Treasury, and Independent Agencies Appropriations Act of 2004, Pub. L. No. 108-199, 108 Stat. 3, 416, Div.G § 419.

Radical Wrecking Ball

Dudley's radical ideas would take a wrecking ball to regulatory policy and the entire network of safeguards we already have in place to protect the air we breathe, the water we drink, and the workplaces we spend most of our daily lives in. The flipside of Dudley's credo applies here: there are too few benefits the public will derive from her ideas, far too many benefits we will lose, and a cost that is much too high for us to bear.

Where Does She Get These Radical Ideas?

Meet the Mercatus Center

Dudley's extremist views make her right at home in the industry-funded think tank she would be leaving to become the new OIRA administrator. Dudley spent the last three years as director of regulatory studies for the Mercatus Center. Based on the campus of George Mason University, the Mercatus Center takes its name from the Latin term "mercatus," which was used to "describe the activity of markets, trade, and commerce."[98] Mercatus describes itself as a "research, education, and outreach organization" that uses "market-based tools and analysis to discover workable solutions to pressing economic and governmental problems."[99]

Underneath this benign cover lies a hostile anti-regulatory agenda. Although Dudley's program has been labeled "regulatory analysis" and "regulatory studies," the truth is that her program has been dedicated to anti-regulatory *advocacy*, so extreme that even the libertarian think tank Cato considers itself more academic than Mercatus. Dudley's radicalism puts her right at home in Mercatus: founded by corporate interests and endowed by large corporations, free-market oriented foundations, and leaders from the corporate world, Mercatus has long operated at the intersection of money, power, and influence in order to promote corporate special interests at the expense of the public interest.

Birth and Development of the Center

Richard Fink, executive vice-president of Koch Industries, Inc.,[100] founded Mercatus (then called the Center for Market Processes) at his alma mater, Rutgers University, in the early 1980s.[101] Later, he moved the organization to George Mason University in Arlington, Virginia, where it resides today. Mercatus blossomed at George Mason in 1997 after receiving a $3 million grant from the Charles G. Koch Charitable Foundation, which was founded by Charles G. Koch,

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[98] Mercatus Center. February 21, 2006, http://www.mercatus.org/category.php/1.html.

[99] Mercatus Center. February 21, 2006, http://www.mercatus.org/category.php/1.html.

[100] Biography of George Mason University Board of Visitors member Richard Fink, at: http://bov.gmu.edu/fink.html (visited Oct. 11, 2002).

[101] "James Buchanan Center Funded with $10 Million Gift," *The Mason Gazette*, March 1998. Available on-line at: http://www.gmu.edu/news/gazette/9803/koch.html (visited October 11, 2002).

chairman and chief executive officer of Koch Industries.[102] Koch Industries, an oil-and-gas giant, is the second largest privately held company in the United States.[103]

The Charles G. Koch Foundation is one of the largest corporate donors to George Mason University, donating over $15 million since 1998 to the George Mason University Foundation, which accepts and manages tax deductible donations on behalf of GMU and its affiliates.[104] The Charles G. Koch Foundation frequently earmarks these donations for the Mercatus Center, and in the past two years alone has donated over $2 million to Mercatus,[105] making the Charles G. Koch Foundation one of the Mercatus Center's largest and most influential continuous donors.[106]

Koch influence has been further felt through donations totaling $150,000 in 1999 and 2000 from the David Koch Foundation, established by Charles' brother, David Koch, an executive vice president of Koch Industries,[107] who also personally donated $100,000 in 2005.[108] Charles Koch and Richard Fink, the Center's founder and Koch executive, both hold seats on Mercatus's eight-member Board of Directors.[109] Thus, the flow of Koch money and influence runs uninterrupted from industry to conservative foundation to recipient.

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102 George Mason University's Development Publication, *Benefactor: An Update on Private Support*, Fall 2001, available on-line at http://www.gmu.edu/development/pubs/benefact/fall01/pages/teamrecruit.html (visited on November 8, 2002).

103 Hoover's Online business capsules, available on-line at http://www.hoovers.com/co/capsule/7/0,2163,40267,00.html

104 George Mason University Development Publication, *Benefactor: An Update on The Campaign for George Mason University,* Fall 2004, available on-line at http://www.gmu.edu/development/pubs/documents/fall2004.pdf, visited Feb. 23, 2006.

105 The Campaign for George Mason University Fast Facts. October 27, 2005. George Mason University. February 23 2006 http://www.gmu.edu/development/pubs/fastfacts/October_2005/email.htm.

106 Benefactor in Brief Update on Private Support to George Mason University April 6, 2006, June 16, 2006 http://www.gmu.edu/development/pubs/fastfacts/april_2006/email.htm

107 David H. Koch Charitable Foundation, IRS Form 990, 1999 and 2000.

108 The Campaign for George Mason University Fast Facts. October 27, 2005. George Mason University. February 23 2006 http://www.gmu.edu/development/pubs/fastfacts/October_2005/email.htm.

109 Mercatus Center, March 5, 2006, http://www.mercatus.org/board.php?menuid=1.

Money, Power & Influence

Koch is not alone in funding Mercatus. In fact, the Mercatus Center's funder list reads like a Who's Who of corporate America. The investment has resulted in handsome returns: Mercatus is an anti-regulatory machine, churning out comments in rulemaking after rulemaking to oppose protections of the public interest — positions which safeguard not the public but the industry bottom line. More than just a mouthpiece, Mercatus establishes connections with congressional staff and administration officials in order to serve as a conduit for industry anti-regulatory advocacy in the halls of power.

Influence For Sale

Just like influential lobbying firms, Mercatus has attracted former administration staff to help sell its anti-regulatory agenda to policymakers. The obvious advantage to having former OMB staff or administrators lies with their institutional memory, knowledge of how the process works, and access to key political appointees and career staff who share their ideological convictions. Corporate donors seeking to roll back regulations no doubt find Mercatus's influence especially appealing.

Many past and current staff members from the Mercatus Regulatory Studies Program — the branch of Mercatus that files regulatory comments — have also worked in OMB's halls, if not OIRA itself. They are:

- Susan Dudley herself, who stepped down as the director of regulatory studies upon being nominated officially to OIRA and still serves as a member of the regulatory team, was an OIRA desk officer specializing in environmental regulations in the late 1980s.

- Wendy Lee Gramm, Mercatus's past Director of the Regulatory Studies Program and a current Distinguished Senior Scholar, was the OIRA administrator from 1985-1988. She was chairwoman of the Commodity Futures Trading Commission from 1998 until January 1993.[110]

- Brian Mannix, a past senior research fellow in the Regulatory Studies Program, served as an OMB economist early in the Reagan administration,[111] and he is now advocating the return of the senior death discount from a perch at EPA.[112]

In addition, James Miller, a former OMB director and chairman of the Federal Trade Commission in the Reagan Administration, is a Distinguished Fellow at the Mercatus Center. (He was also general counsel at the Koch Foundation funded Citizens for a Sound Economy.)[113] Miller was the first director of the office that became OIRA and helped draft Executive Order 12,291, which assigned to OIRA regulatory oversight duties far beyond those authorized by Congress in the Paperwork Reduction Act.[114]

Perhaps the most important person to go through Mercatus's revolving door is OIRA's recent past director, John Graham, who served on the Mercatus Center advisory board until his appointment by Bush in 2001.[115]

Mercatus can also boast its congressional-networking Capitol Hill Campus, a program that attempts to "bridge the gap" between academics and policymakers through breakfasts, seminars, and an annual retreat for congressional chiefs of staff

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[110] For more about Gramm and just what can go wrong when money, power, and influence collide, see appendix D.

[111] Jim Sibbison, "EPA's Loss of Power and Independence," *Newsday*, December 17, 1985.

[112] *See* OMB Watch, *Return of the Senior Death Discount?: Heinzerling Takes On Mannix*, OMB WATCHER, May 30, 2006, available at <http://www.ombwatch.org/article/articleview/3447/1/134?TopicID=3>.

[113] Biography of Mercatus Center Distinguished Fellow, James Miller. Available at http://www.mercatus.org/about/miller.htm (visited October 11, 2002).

[114] Telephone Interview with Gary Bass, Founder and Executive Director of OMB Watch, October 7, 2002.

[115] Ellen Nakashima, "Influence of Industry on Rules Agency Questioned," *Washington Post*, March 13, 2002.

and other high level legislative aides. In 2001 and 2002, the program played host to more than 3,500 staffers.[116]

One annual three-day retreat for these high-level aides was held February 2006 in Richmond, Virginia, at the five-star Jefferson Hotel. The program included seminars and roundtables with titles such as "Costs of the Tort System: Benefits of Reform" and "Making Government Accountable, Improving Oversight of Federal Programs."[117]

The Mercatus Center also holds "Distinguished Scholar Breakfasts," which are invitation-only programs that focus on the role of markets in policy areas designed to promote "exchanges among senior staff, colleagues, and a scholar in a particular field."[118] There are also free lunches for staffers when they attend seminars that have titles ranging from "First Quarter 2006: How About that Economy?" to "Oil, Natural Gas and Economics: A Primer."[119] As an added bonus, Capitol Hill Campus participants can earn continuing education credits through George Mason University.

Mercatus, the Savvy Fundraiser

Aside from Koch, many other corporate interests provide funds to the Mercatus Center, which offers donors increasing levels of access in return for contributions. Contributions of $1,000 or more admit patrons into the Liberty Circle, which entitles them to receive updates on the Center's work, a newsletter and invitations to various Mercatus events, including an annual meeting held each fall in Washington, D.C. The Center promises attendees "an opportunity to meet and visit with our scholars, fellows and staff," briefings "on our new and ongoing projects," and the chance to "hear from movers and shakers who are working to enable individuals to live free, prosperous, and peaceful lives."[120]

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[116] Mercatus Center website, at http://www.capitolhillcampus.org (visited September 24, 2002).

[117] Mercatus Center website, http://www.mercatus.org/capitolhillcampus/article.php/1546.html (visited March 6, 2006).

[118] Mercatus Center website, at http://www.mercatus.org/capitolhillcampus/article.php/1056.html (visited March 6, 2006).

[119] Mercatus Center website, at http://www.capitolhillcampus.org (visited March 6, 2006).

[120] The Mercatus Center uses its website to solicit contributions so that it can "achieve its mission of scholarly research, talent development, and outreach to influential decision-

To lure the heavy hitters, Mercatus sweetens the pot. A $10,000 contribution buys donors a membership to the Founders Circle and an invitation to the Founders Circle Retreat, held each spring. And, for Founders Circle members who donate $25,000 or more, Mercatus created the Founders Circle Executive Level, which offers all of the perks of the traditional Founders Circle membership with added prestige and invitations to "special one-of-a-kind events."[121]

In the past, Founders Circle retreats have been held in posh environs such as the Biltmore in Phoenix, Arizona, and the Ritz-Carlton Laguna Niguel in Dana Point, California. Past speakers have included Larry Kudlow, conservative commentator and regular columnist in the *National Review*; John Stossel of ABC, who has developed a reputation for attacking the tort system, which consumers use to hold corporations accountable for defective products; and Federal Election Commission chairman Brad Smith, an ardent foe of regulating campaign contributions.

Founders Circle membership consistently attracts conservative or free-market oriented individuals, foundations and corporations. Corporate members have included BP Amoco, Exxon Mobil Corporation, General Motors, JP Morgan Chase, Merrill Lynch, Microsoft, Pfizer, the Gillette Company, State Farm Insurance Companies, Altria Corporate Services, Inc. (the service provider for the Altria Group, which owns Philip Morris and Kraft Foods), and UST Public Affairs Inc., a company specializing in smokeless tobacco.

Several right-wing foundations, the vast majority of which have ties to corporate America, have also donated funds to the Mercatus Center gaining membership into the Founders Circle. Among these foundations are the Castle Rock Foundation, which is owned by the Coors family of the Coors Brewing Company; the Walton Family Foundation, Inc., which is controlled by the Walton family of Wal-Mart retail stores; and the Armstrong Foundation, which is entirely funded by the Armstrong Company, which specializes in home flooring, ceilings, and cabinets.

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makers." Potential donors are encouraged to become a member of its "exclusive giving circles," the Liberty Circle and the Founders Circle. *See* http://www.mercatus.org/category.php/23.html?menuid=4, (visited Oct. 11, 2002 and Feb. 7, 2006).

[121] Support Mercatus. Mercatus Center George Mason University. February 23, 2006 http://www.mercatus.org/category.php/23.html?menuid=4.

The Charles G. Koch charitable foundation and the David H. Koch Charitable foundation are also consistent Founders Circle Members. Both of these foundations are managed by Koch company officials and funded entirely by the Koch Company. The Sarah Scaife Foundation, which is largely funded by the Mellon family's oil and industrial fortunes, is also a member of the Founders Circle and is well known for funding conservative public policy think tanks such as the Heritage Foundation and the Cato Institute.

A number of individuals, primarily from the ranks of current or former corporate executives, have also belonged to the Founders Circle. They include: Arthur Cinader, the former chairman of J. Crew; Sheldon Rose, CEO of Edward Rose Building Enterprises, a Michigan-based residential home construction firm; and Sam Wyly, the chairman of Green Mountain Energy and Sterling Software. Wyly was responsible for the clandestine funding of $2.1 million in campaign advertisements that attacked Sen. John McCain's (R-Ariz.) environmental record during the 2000 presidential campaign while trumpeting then-Gov. George W. Bush's environmental record in Texas.[122]

Reaping What They Sow

The companies, foundations, and individuals investing in Mercatus have found a prolific and dedicated group to serve them. Since 1996, Mercatus has weighed in on agency rulemakings, submitting comments critical of regulation. Attacking a wide variety of regulations, Mercatus has commented to EPA, the SEC, the Department of Agriculture, the Department of Energy, the Department of the Interior, the Federal Deposit Insurance Corporation, the Federal Reserve, the Food and Drug Administration, the Federal Motor Carrier Safety Administration, the National Highway Traffic Safety Administration, and the Department of Health and Human Services, among others.

The industries that have provided the most support—petrochemical companies and financial firms—are also the industries that would benefit the most from Mercatus's advocacy. They were rewarded in 2001 and 2002, when former OIRA administrator (and former Mercatus advisory board member) John Graham used an annual report to Congress on the costs and benefits of regulations as an

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[122] John Mintz, "Texan Aired 'Clean Air' Ads; Bush's Campaign Not Involved, Billionaire Says," *Washington Post*, March 4, 2000.

invitation to the public to nominate regulations "that could be rescinded or changed [to] increase net benefits to the public by either reducing costs and/or increasing benefits."[123] Not surprisingly, nearly all of the 71 nominations published in OIRA's final report for 2001 were submitted on behalf of regulated industry and 55 of the nominated regulations were health, safety, or environmental protections.[124]

The Mercatus Center jumped on the opportunity to advance its anti-regulatory agenda, as Dudley and a team of Mercatus staff submitted more than half of the 71 nominations for revision or change culled for OIRA's final report. This was not a difficult task, considering Dudley and her team only had to recycle 44 of the regulatory comments they had submitted to agencies over the years.[125] In all, Mercatus urged OIRA to weaken or eliminate 24 environmental rules (in addition to rules issued by the EPA, this included rules issued by the Army Corps of Engineers, the Department of Energy, Federal Energy Regulatory Commission, the Department of the Interior and the Forest Service), six rules protecting public health and safety (issued by the Department of Health and Human Services, the Department of Labor, and the Department of Transportation), 13 rules relating to finance and banking (issued by the Securities and Exchange Commission, Office of Comptroller of the Currency, Federal Deposit Insurance Corporation, the Commodities Futures Trading Commission, and the Office of Thrift Supervision), and one rule issued by the United States Postal Service. In its 2001 review, OIRA deemed 23 rules to be of "high priority," meaning that OIRA was "inclined to agree and look into the suggestion."[126] Mercatus submitted 14 of these 23: ten targeting environmental safeguards for weakening or elimination, with the remaining four targeting public health and safety protections.

The Mercatus Center's aggressive use of the OIRA nomination process in 2001 set the stage for an outpouring from business and industry in 2002, when Graham issued his next invitation for suggestions regarding changes that could be

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[123]Draft Report to Congress on the Costs and Benefits of Federal Regulations, 66 Fed. Reg. 22,041 at 22,054 (2001).

[124] Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities [hereinafter 2001 Final Report] Appendix A, Office of Management and Budget, Office of Information and Regulatory Affairs, http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf (visited Oct. 11, 2002).

[125] For more details, read Appendix B.

[126] 2001 Final Report, at 62-64.

made in federal regulations. A total of 267 regulations were targeted,[127] with the largest single segment of commenters — at least 80 or more — from businesses or firms, associations and consultants affiliated with businesses, industries or employer groups.[128] As it had a year earlier, Mercatus took advantage of the 2002 process, this time challenging or commenting on nearly two dozen regulations, with Dudley again leading the charge.

Every time, Dudley and the other Mercatus staffers were pushing rollbacks that would directly benefit their corporate patrons. BP Amoco, ExxonMobil, and the Kochs, for example, would benefit from 14 of the suggestions Dudley and company filed in 2001 to weaken the Clean Air Act. These petrochemical companies would also benefit from four of the Mercatus Center's 2002 submissions calling for the weakening of the Clean Water Act. And of the 44 regulations nominated by Mercatus to OIRA in 2001 as ripe for rescission or change, 24 would have directly benefited the center's corporate funders.

The financial services industry also got its money's worth. Mercatus patrons have included Merrill Lynch, JP Morgan Chase, the NASDAQ Educational Foundation, the New York Stock Exchange, Fannie Mae, and Freddie Mac. Eleven of the 44 deregulatory proposals Mercatus submitted to OIRA in 2001 and six of the 24 proposals submitted in 2002 demanded changes to banking and finance rules that apply to securities firms and self-regulatory organizations.

For example, Mercatus suggested reopening an SEC rule issued in November 2000 that increased transparency in how securities broker-dealers execute orders. In order to spur greater competition among market centers and ensure the best prices on trades, the rule required reports to investors to describe how orders were routed.[129] The SEC estimated that the additional information

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[127] "Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, Tribal Entities," Chapter IV, available on-line at http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf (page 75)

[128] Public Citizen analysis of "Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, Tribal Entities," Appendix B. Key to Public Comments, available on-line at http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf (pages 92-101).

[129]Securities and Exchange Commission, Final Rule: Disclosure of Order Execution and Routing Practices, 11/17/00, http://www.sec.gov/rules/final.shtml; Proposed Rule: Disclosure of Order Routing and Execution Practices, Release No. 34-43084; File No. S7-16-00, http//www.sec.gov/rules/proposed/34-43084.htm.

could allow investors to potentially save more than $160 million from lower trade fees while costing broker-dealers $21 million a year. In its comments, the Securities Industry Association, which represents an array of securities firms and banks, including Merrill Lynch and JP Morgan Chase, suggested that the Commission's proposal would end up hurting small investors. Ironically, the industry's argument relied on measures that deviated from a strict cost-benefit analysis: "The [SIA] believes . . . that the measures of execution quality that the Commission proposes elevate price and speed over other, less easily quantifiable, measures that may be equally important to certain investors in assessing execution quality."[130]

Mercatus's comments to the SEC at the time — resubmitted later by Dudley and crew to OIRA, after the rule was finished — reflected the industry's concerns. In its comments, Mercatus itemized the "other, less quantifiable, measures" alluded to by SIA in its submission: "[i]n addition to trading costs, including commission and bid-ask spread, a trading system or exchange competes on the basis of how well it meets investor demands regarding the speed of execution, transparency of trading activity, certainty of execution, order size, and even the time of transaction. Consequently, different types of traders seek to trade in different markets depending on liquidity effects and transaction costs associated with their particular demands."[131]

Tellingly, Mercatus's comment about unquantified benefits shed its usual cost-benefit straightjacket and embraced the position that other intangibles should be taken into account — a line of argument Dudley shows no fondness for in the context of health, safety, and environmental rules. At the bidding of Dudley's corporate sponsors, however, Mercatus's jettisoning of cost-benefit analysis in this case would leave ordinary investors in the dark. Mercatus's submission is especially wrongheaded in a post-Enron world where the value of greater transparency in financial markets is obvious to everyone.

By far the biggest corporate contributor to the Mercatus Center, and the group with the clearest personal ties to it, is the Koch group of foundations and, through them, Koch Industries. A privately-held $25 billion petroleum, chemical,

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[130]Mark Sutton, Securities Industry Association, to Jonathan Katz, Securities and Exchange Commission, "Re: Securities Exchange Act Release No. 34-43084; File No. S7-16-00," September 26, 2000.

[131]Sharon Brown-Hruska and Jerry Ellig, "SEC's Disclosure of Order Routing and Execution Practices," (RSP-2000-19), 9/22/00. *See* http://www.mercatus.org (visited September 24, 2002).

and agricultural company based in Wichita, Kansas, Koch Industries has good reason to angle for a rollback of environmental standards. In 2001, the company's petroleum division pleaded guilty to violating the Clean Air Act for releasing benzene, a known carcinogen, into the air at a Texas refinery.[132] Koch agreed to pay $10 million in criminal fines and further agreed to spend $10 million for environmental projects in the Corpus Christi area. In addition, Koch must complete a five-year term of probation and adhere to a strict new environmental compliance program.

In a separate incident, Koch agreed to pay a $4.5 million penalty to settle other Clean Air Act violations at its Minnesota refinery.[133] The EPA also forced the company to spend an estimated $80 million to install new pollution-control equipment at two refineries in Corpus Christi, Texas, and one near St. Paul, Minnesota.[134]

Koch also has had a problem playing by the rules of the Clean Water Act. The EPA found that during a seven-year period in the 1990s, a Koch pipeline subsidiary allowed 300 leaks to remain unstopped, spilling three million gallons of oil into waterways across six states. In January 2000, the EPA leveled $30 million in civil fines against Koch, then the largest U.S. civil penalty, and required Koch to spend an additional $5 million on environmental projects.[135]

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[132]Environmental Protection Agency Press Release, April 13, 2001. Available on-line at http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/0dbb0beb2a2d70d885256a2d0072a509?OpenDocument (visited October 11, 2002).

[133]Environmental Protection Agency Civil Enforcement Website, Koch Petroleum Group, L.P. Refinery Settlement, http://www.epa.gov/Compliance/resources/cases/civil/caa/kochcaa.html (visited Oct. 11, 2002).

[134] Environmental Protection Agency Civil Enforcement Website, Koch Petroleum Group, L.P. Refinery Settlement, http://www.epa.gov/Compliance/resources/cases/civil/caa/kochcaa.html (visited Oct. 11, 2002).

[135] "Pipeline operator agrees to huge fine Texas leaks covered by $35 million penalty," *Ft. Worth Star Telegram*, January 14, 2000. *See also*, Environmental Protection Agency Website, Koch Industries, Inc. Oil Spills Settlement, http://www.epa.gov/compliance/resources/cases/civil/cwa/kochcwa.html (visited Oct. 11, 2002).

In all, nine of the 15 deregulatory proposals submitted by the Mercatus Center to OIRA in 2001 affecting EPA regulations dealt with the Clean Air Act. Three of the remaining six EPA nominations targeted the Clean Water Act. Additionally, in the Center's 2002 submissions, nine nominations addressed EPA regulations, five of which targeted the Clean Water Act or the Clean Air Act. All the revisions have the potential, if enacted, of benefiting Koch by weakening environmental standards designed to protect public health and safety.

Mercatus claims to submit regulatory comments "from the perspective of the public interest."[136] Yet unlike most groups promoting the public interest, Mercatus accepts money from corporate sources, creating a conflict between the organization's financial health and the public good when corporate interests and the public interest are at odds. Such a conflict can affect an organization at all levels, from top-level executive decisions to research publications.

Mercatus states that "financial supporters have absolutely no influence or control over the research design, methodology, analysis, or findings of Mercatus research projects, nor do they have influence or control over the content of educational programs."[137] Yet this claim rings hollow considering that an industry-critical research project may cost Mercatus hundreds of thousands of dollars in funding. Moreover, Mercatus' elaborate social events for high-paying contributors encourage interaction between corporate donors and Mercatus staff. Mercatus's rhetoric of purported independence does nothing to minimize the conflict of interest the organization faces in accepting funds from corporate donors and, further, is in stark contrast to its active promotion of interaction between its donors and its staff.

In its comments to agencies, Mercatus also assumes an independent stance, claiming that its comments provide "careful, scholarly analysis independent of any special interest group"[138] and omitting the fact that it accepts funds from corporate interests. This allows Mercatus to lend a public interest veneer to its anti-regulatory agenda, which plays into the hands of its corporate funders, who, through

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[136] Wendy Gramm, "Advanced Air Bags: Regulatory Studies Program Comments," Mercatus Center, December 17, 1998, available at http://dmses.dot.gov/docimages/pdf32/48314_web.pdf.

[137] Mercatus Center, available at http://www.mercatus.org/subcategory.php/328.html, visited March 8, 2006.

[138] Mercatus Center, available at http://www.mercatus.org/regulatorystudies/category.php/36.html, visited March 8, 2006.

Mercatus, are able to combat regulations while concealing their self-interest in rolling back public protections.

Dudley's unique brand of market-friendly "economics" may simply coincide with corporate interests by mere happenstance, but it is highly dubious that Dudley's anti-regulatory crusade is not influenced by the Center's corporate donors. Mercatus faces a deep conflict of interest in accepting funds from corporate donors. There is much for Mercatus's corporate donors to gain from the Center's anti-regulatory actions, and there is much for Mercatus to gain from acting in the interests of its corporate donors. Installing Susan Dudley in OMB will be their latest gain, and the public's loss.

Conclusion

If confirmed as administrator of OIRA, Susan Dudley would be granted enormous power to destroy the nation's safeguards for the public health, safety, civil rights, environment, consumers, and other public interest needs. As we can see from her background, however, Dudley cannot be trusted with such power over the public good. She will bring with her a radical agenda to dismantle the public's protections and weaken or eliminate the agencies' ability to produce the new safeguards that we need.

Dudley is, in fact, so radical that she is outside the mainstream of her fellow anti-regulatory activists. Mercatus works closely with another Koch-funded think tank, the libertarian Cato Institute. Dudley even contributes to a monthly Cato publication called *Regulation*. According the magazine's managing editor, however, Dudley's work has to be toned down for the Cato audience. "'The material that they send to us, they try to tone down,' he says. 'Cato is more of a public policy research organization. We may be a little more academic than they are.'"[139]

Moreover, she is out of step with the administration she would be tapped to serve. Dudley has frequently criticized regulations touted by the administration as an achievement. For example, Dudley departed significantly from the Bush administration's line on a rule to improve the public's protections from arsenic in the drinking water:

What the administration said	*What Dudley said*
"[W]e are acting in a common sense way to defend our environment. We are adopting new, scientifically sensible rules to discourage emissions of lead, to protect wetlands, to reduce the amount of arsenic in drinking water, to curb dangerous pesticides and to clean the air of pollution from on-road diesel engines."[140]	The improved standards are "an unwelcome distraction from the task of protecting the water supply. . . . While [EPA] should share information about arsenic levels and hazards, it should not impose its judgment, based on national average costs and benefits, on individual communities as to how best to invest in their own public health."[141]

[139] *See* Garance Franke-Ruta, *Enron Collapsed; the Earth is Warming Up; and GMU's Mercatus Center Says the Solution Lies in Two Public Policy Heroes: Supply and Demand*, WASH. CITY PAPER, Mar. 14, 2002, at 21, *available on Westlaw at* 2002 WLNR 11578632.

[140] Presidential Radio Address, April 28, 2001, *available at* <http://www.whitehouse.gov/news/releases/2001/04/20010428.html>.

Given her extremism, even when compared against recent administrator John Graham, Dudley's appointment is the signal that the Bush administration is moving from siege to all-out war on the public's protections.

Most troubling is that Dudley is miles away from the American mainstream. The American public has declared, repeatedly and overwhelmingly, its belief that the federal government has an important role to play in protecting the public.[142] Dudley is hostile that role; if allowed to assume power, it is clear that she would actively work to undermine it.

Dudley is opposed to many of the American public's most cherished values. Instead of equity, she offers Dudleynomics. Instead of concern about the world we are creating for our children and future generations to come, Dudley cynically asks,

> If we could go back in time, would we really ask our (relatively poorer) ancestors to set their money aside at a one percent return for our benefit? Indeed, would we even be better off if they had done so? They would have had to forsake many higher return investments to make this "investment in the future" and as a result, our standard of living would likely be lower today, even with the "inheritance" they left us invested at a one percent rate.[143]

Instead of recognizing a need for regulation, Dudley sees only reasons not to protect the public. Dudley's moral vision is one that most Americans would reject.

There is too much at stake to allow Dudley to helm OIRA. The benefits will accrue only to corporate special interests and radical ideologues, while the costs will be borne by the public. Those costs are too high.

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141 Susan E. Dudley, *How Not to Improve Public Health*, Jan. 11, 2001, *available at* <http://mercatus.org/publications/pubID.2630/pub_detail.asp>.

142 *See* Harris, *supra* note 21.

143 *See* Dudley & Mannix, *supra* note 35, at 11.

APPENDIX A

Mercatus Center Founders Circle 2004

List provided to Public Citizen by the Mercatus Center

Altria Corporate Services, Inc.
Anschutz Foundation
The Armstrong Foundation
W. H. Attebury
Richard A. Bacas
Bachman Foundation
Elliot A. Baines
Mr. & Mrs. Frank E. Baxter
Bochnowski Family Foundation
Castle Rock Foundation
Dorothy Byrne
Patrick M. Byrne
Charles G. Koch Charitable Foundation
Paul G. Chelew & Shirley F. McKenzie
Arthur A. Ciocca
Richard W. Colburn
Covenant Foundation
Garland & Carolyn Cox
E. L. Craig Foundation
Dan E. Cullen
D & D Foundation
David H. Koch Charitable Foundation
Mr. & Mrs. Jeremy S. Davis
The Shelby Cullom Davis Foundation
Earhart Foundation
Exxon Mobil Corporation
Freddie Mac
Philip M. Friedmann
Larry & Mary Futchik
Edwin A. Gallun, Jr.
General Motors Corporation
The Gillette Company
Mr. & Mrs. Thomas C. Graham
Richard R. Greer
Elmer R. Haile, Jr.
Harold E. Hamilton
Philip D. Harvey
IFREE
John E. & Sue M. Jackson Charitable Trust
Ruth H. Jackson Charitable Trust
Jeld-Wen Foundation
Craig W. Johnson
John P. Kavooras
Mr. & Mrs. Michael L. Keiser
Randy Parris Kendrick
Mr. & Mrs. Richard Korpan
Dr. & Mrs. Benjamin LeCompte, III
Allan W. & Lois J. Lund
Natalie C. Lund
Mr. & Mrs. Bartley Madden
E. Pierce Marshall
Miriam & Emmett McCoy Foundation
John T. & Libby Menefee
Microsoft
Joseph R. Mitchell
The Modzelewski Charitable Trust
Dorothy Donnelley Moller
The Hon. Herbert N. Morgan
Albert G. Oaks
Pfizer Inc.
Mrs. Dorothy Pollak
The John William Pope Foundation
Robert A. Pritzker
James M. Rodney
Sarah Scaife Foundation Inc.
Dwight C. Schar
James W. Shields
Dr. Vernon L. Smith
Henry M. Staley Charitable Trust
State Farm Insurance Companies
Jackson T. Stephens, Jr.
Sunmark Foundation
William Thomas
James C. Thompson
James E. Upfield
US Chamber of Commerce
UST Public Affairs Inc.
Alex C. Walker Educational & Charitable Foundation
The Walton Family Foundation, Inc.
F. William Weber
Mr. & Mrs. Jerry A. Wenger
Prof. & Mrs. John O. Whitney
Joseph H. Wilkens
Christopher & Patricia Witzky
Betty K. Wolfe
Sam Wyly
Fred M. Young, Jr.
Norma E. Zimdahl

APPENDIX B

Agencies and Regulations Targeted by Mercatus's Submission to OIRA in 2001

Environmental Rules

Environmental Protection Agency (15 Rules)

1. Toxic Release Inventory, Persistent Bioaccumulative Toxics (PBT) Rule/Priority 2
2. Total Maximum Daily Loads/Priority 1
3. Economic Incentive Program Guidance/Priority 1
4. New Source Review 90-Day Review Background Paper/Priority 1
5. Concentrated Animal Feeding Operation (CAFO) Effluent Guidelines/Priority 1
6. National Ambient Air Quality Standard for Particulate Matter/Priority 3
7. Heavy-Duty Engine and Diesel Rule/Priority 3
8. Request for Comments on Petition: Control of Emissions from New and In-Use Highway Vehicles and Engines/Priority 2
9. EPA's and DOJ's Worst Case Scenario Proposal/Priority 3
10. National Ambient Air Quality Standard for Ozone/Priority 3
11. Supplemental Notice for the Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; Proposed Rule/Priority 3
12. Request for Comments on Environmental Enforcement and Compliance Assistance Activities/Priority 3
13. EPA's Tier 2 Standards for Vehicle Emissions and Gasoline Sulfur Content/Priority 3 (Summarizes two of Mercatus' comments—separate comments provided re: public comments on an FR Notice of Supplemental Information and Request for Comment related to this rulemaking)
14. Arsenic in Drinking Water/Priority 1
15. Ground Water Rule/Priority 3

Department of Defense/Army Corps of Engineers (1 Rule)

1. Nationwide Permits for Discharge of Dredge or Fill Material/Priority 3

Department of Energy (2 Rules)

1. Clothes Washer Energy Conservation Standards/Priority 3
2. Central Air Conditioner and Heat Pump Energy Conservation Standards/Priority 1

Federal Energy Regulatory Commission (1 Rule)

1. Regulation of Short-Term and Long-Term Gas Transportation/Priority 2

Department of the Interior (2 Rules)

1. Hardrock Mining (Section 3809) (proposal)/Priority 1
2. Snowmobile Use in Rocky Mountain National Park (proposal)/Priority 1

United States Department of Agriculture/Forest Service (3 Rules)

1. Roadless Area Conservation (draft Environmental Statement)/Priority 1
2. Forest Service Planning Rules/Priority 1
3. Forest Service's Roadless Area EIS Notice/Priority 1

Total Environmental Rules: 24

Finance & Banking Rules

Securities and Exchange Commission (7 Rules)

1. Nasdaq Integrated Order Delivery and Execution System/Priority 2
2. Concept Release on Regulation of Market Information, Fees and Revenues/Priority 2
3. Commission Request for Comment on Issues Relating to Market Fragmentation/Priority 2
4. Disclosure of Mutual Fund After-Tax Returns/Priority 2
5. Disclosure of Order Routing and Execution Practices/Priority 2
6. Proposed Rule Changes of Self-Regulatory Organizations/Priority 2
7. Registration of Broker-Dealers Pursuant to Section 15(b)(11) of the Securities Exchange Act of 1934/Priority 2

Federal Deposit Insurance Corporation/Office of Comptroller of the Currency/Office of Thrift Supervision (2 Rules)

1. Second Consultative Package on the New Basel Capital Accord/Priority 2
2. Minimum Security Devices, and Procedures and Bank Secrecy Act Compliance/Priority 2

Commodities Futures Trading Commission (2 Rules)

1. Request for Comments on Proposed Rules Relating to a New Regulatory Framework for Multilateral Transaction Execution Facilities, Intermediaries and Clearing Organizations; Exemption for Bilateral Transactions/Priority 2
2. Fast-Track Designation and Rule Approval Procedures/Priority 2

Federal Reserve Board (2 Rules)

1. Privacy of Consumer Financial Information/Priority 2
2. Revision to Regulation B/Priority 3

Total Finance & Banking Rules: 13

Public Health & Safety Rules

Department of Health and Human Services (2 Rules)

1. Standards for Privacy of Individually Identifiable Health Information/Priority 1
2. Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims/Priority 1

Department of Labor (2 Rules)

1. OSHA Consultation Program/Priority 2
2. Davis-Bacon Act “Helpers” Regulation/Priority 1

Department of Transportation (2 Rules)

1. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations/Priority 1
2. Advanced Air Bags/Priority 2

Total Public Health & Safety Rules: 6

Miscellaneous

United States Postal Service (1 Rule)

1. Delivery of Mail to a Commercial Mail Receiving Agency/Priority 3

Total Miscellaneous Rules: 1

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44 Total Mercatus Nominations

APPENDIX C

Mercatus Center Contributors Affected by Federal Regulatory Proposals Challenged by the Mercatus Center In 2001

Finance, Banking & Trading Industry Contributors	Regulatory Proposals Affecting the Finance, Banking & Trading Industry
Fannie Mae Freddie Mac Instinet Corp. Knight Trading Group Merrill Lynch J.P. Morgan Chase NASDAQ Foundation New York Stock Exchange Mr. & Mrs. Warren B. Lammert	1. Basel Cmte. on Banking Spvn./OCC/FDIC/Bd. of Governors of Fed. Reserve- New Basel Capital Accord (Priority 2) 2. CFTC-Framework for Multilateral Transaction Execution Facilities, Intermediaries and Clearing Organizations (Priority 2) 3. Exemption for Bilateral Transactions (Priority 2) 4. Fed. Res. Bd.-Privacy of Consumer Financial Information (Priority 2) 5. SEC-NASDAQ Integrated Order Delivery and Execution System (Priority 2) 6. SEC-Regulation of Market Information, Fees and Revenues (Priority 2) 7. SEC-Issues Relating to Market Fragmentation (Priority 2) 8. SEC-Disclosure of Mutual Fund After-Tax Returns (Priority 2) 9. SEC-Disclosure of Order Routing and Execution Practices (Priority 2) 10. SEC-Proposed Rule Changes of Self-Regulatory Organizations (Priority 2) 11. SEC-Registration of Broker-Dealers (Priority 2) 12. CFTC-Fast-Track Designation and Rule Approval Procedures (Priority 2) 13. FDIC-Minimum Security Devices, and Procedures and Bank Secrecy Act Compliance (Priority 2) 14. Fed. Res. Bd.-Revision to Regulation B (Priority 3)

Oil and Gas Industry Contributors Affected	Regulatory Proposals Affecting the Oil and Gas Industry
BP Amoco ExxonMobil Dr. Richard Fink Strake Foundation Charles G. Koch Charitable Foundation David H. Koch Charitable Foundation Claude R. Lambe Charitable Foundation	1. EPA-Total Maximum Daily Loads (Priority 1) 2. EPA-Economic Incentive Program Guidance (Priority 1) 3. EPA-New Source Review 90-Day Review (Priority 1) 4. EPA-Toxic Release Inventory (Priority 2) 5. FERC-Regulation of Short-Term and Long-Term Gas Transportation (Priority 2) 6. EPA-National Ambient Air Quality Standard for Particulate Matter (Priority 3) 7. EPA-National Ambient Air Quality Standard for Ozone (Priority 3) 8. EPA-Regional Transport of Ozone Proposed Rule (Priority 3) 9. EPA-Environmental Enforcement and Compliance Assistance Activities (Priority 3) 10. EPA-Ground Water Rule (Priority 3)

Priority 1: High Priority *OIRA is "inclined to agree and look into the suggestion"*
Priority 2: Medium Priority *OIRA "need[s] more information"*
Priority 3: Low Priority *OIRA is "not convinced at this point of the merits of the suggestion"*

APPENDIX D

The Mercatus Center's Toxic Mix of Money, Power, & Influence: A Case in Point

Mercatus's troubling ties to regulated industry are perhaps most vividly embodied in Wendy Lee Gramm, former director of Mercatus's regulatory program who currently holds the title of "Distinguished Senior Scholar."

A long-time government insider, Gramm has been a steadfast advocate of deregulation throughout her career. President Ronald Reagan referred to Gramm as his "favorite economist"[1] and appointed her to several posts during his administration. She served first as Executive Director of the Presidential Task Force on Regulatory Relief, created by Reagan in 1981 to "cut away the thicket of irrational and senseless regulations."[2] In 1982, Reagan selected her to be the assistant director of the Federal Trade Commission's Bureau of Economics and elevated her to director the following year. From 1985 to 1988, Gramm served as the administrator of OIRA, a perch from which she oversaw the development of all federal regulations. Finally, in 1988, Reagan appointed her chairperson of the Commodity Futures Trading Commission (CFTC), a position she held until January 1993, when she left following the inauguration of President Clinton.

The CFTC is an independent agency created by Congress in 1974 with the mandate to regulate U.S. commodity futures and option markets. A futures contract is an agreement between parties to buy or sell in the future a specific quantity of a commodity. Traditionally, traded commodities have included agricultural products, such as wheat and corn. More recently, futures trading has expanded to include such products as natural gas and electricity. An option on a commodity futures contract gives the buyer of the option the right to convert the option into a futures contract. Futures and options must generally be executed on the floor of a commodity exchange (like the New York Mercantile Exchange) and through persons and firms who are registered with the CFTC. Through oversight and regulation of these transactions, the CFTC protects market participants from manipulation, abusive trade practices, and fraud by providing a means for price discovery and offsetting price risk.[3]

In 1992, as the first step in its business plan to profit on the speculation of energy, Enron petitioned the CFTC to make regulatory changes that would limit the scope of the commission's authority over certain kinds of futures contracts.[4] Immediately before leaving the CFTC, Gramm muscled through approval of an unusual draft regulation that would do just that – it narrowed the definition of futures contracts and excluded Enron's energy future contracts and swaps from regulatory oversight. Although her actions were criticized by government officials who feared the change would have severe negative consequences (as, in fact, it did), Gramm was rewarded five weeks after she left the CFTC with a lucrative appointment to Enron's Board of Directors.[5]

Between 1993 and 2001, when the company declared bankruptcy, Enron paid Gramm between

[1] Nancy Benac, "Enron and Phil and Wendy Gramm," *North County Times*, January 24, 2002.

[2] President's Remarks Announcing the Establishment of the Presidential Task Force on Regulatory Relief, January 22, 1981.

[3] The information in this paragraph is from the CFTC's website, (available on line at http://www.cftc.gov/cftc/cftcglan.htm and viewed on November 7, 2002) and *Blind Faith: How Deregulation and Enron's Influence Over Government Looted Billions from Americans*, Public Citizen's Critical Mass Energy and Environment Program, December 2001 [hereinafter *Blind Faith*] (available on-line at http://www.citizen.org/cmep/energy_enviro_nuclear/electricity/Enron/articles.cfm?ID=7104).

[4] Jerry Knight, "Energy Firm Finds Ally, Director, in CFTC Ex-Chief," *Washington Post*, April 17, 1993. *See also Blind Faith.*

[5] *Blind Faith.*

$915,000 and $1.85 million in salary, attendance fees, stock option sales, and dividends.[6] As a member of Enron's Board of Directors, Gramm served on the audit and compliance committee, which was responsible for verifying Enron's accounting procedures and other detailed financial information not available to outside analysts or shareholders.[7] She held this position even as the company's financial status became increasingly precarious and eventually imploded, taking with it the retirement savings of thousands of Americans. Subsequently, Gramm was one of 49 individuals subpoenaed by the Senate Permanent Subcommittee on Investigations in its investigation of the Enron fiasco.[8]

In addition to providing lavish payments to Gramm as a member of its Board of Directors, Enron supported Gramm's work following her departure from the CFTC. For instance, Enron and the Lay Foundation, which was established and controlled by former Enron CEO Kenneth Lay and his wife Linda, donated $50,000 to the Mercatus Center.[9] Kenneth and Linda Lay donated an additional $5,000 in both 1998 and 2000. Former Enron Energy Service Director, Lou Pai rounds out the circle of giving, having contributed an amount reported as "under $10,000."[10] During its investigation into the cause of the Enron meltdown, the Senate Committee on Governmental Affairs found that "the independence and objectivity of the Enron Board was compromised by financial ties between Enron and certain directors," including, specifically, Wendy Gramm.[11]

During her tenure at Mercatus, Gramm has submitted comments to federal agencies consistent with Enron's deregulatory agenda — including at least two comments on regulations proposed by the CFTC (the same agency she led from 1988-1993). In addition, Sharon Brown-Hruska, a former associate professor at George Mason University, and Jerry Ellig, a Mercatus Center Senior Research Fellow, also drafted several comments on behalf of Mercatus that, if adopted, could have had a positive impact on Enron's bottom line.[12] As an interesting aside, Brown-Hruska was a staff economist for the CFTC during Gramm's term as CFTC chairperson. Brown-Hruska returned to the CFTC, where she is currently employed, in August 2002 following her appointment as commissioner by President Bush. Ellig served as the deputy director of the Office of Policy Planning at the Federal Trade Commission from August 2001 until August 2003 and has since returned to the Mercatus Center as a senior research fellow.

Enron also had close ties to Capitol Hill through Wendy Gramm's husband, former Texas Sen. Phil Gramm. Before retiring in December 2002, Sen. Gramm was the highest-ranking Republican on the powerful Committee on Banking, Housing & Urban Affairs, and served as chairman of that committee from 1999 until the Democrats gained control of the Senate in June 2001. Phil Gramm now serves as the vice-chairman of the UBS Investment Bank. Enron was Gramm's single largest corporate contributor between 1989 and 2001, giving $97,350 according to the Center for Responsive Politics.[13] Only fellow Texas senator Kay Bailey Hutchinson accepted more money from Enron.

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[6] *Blind Faith.*

[7] *Blind Faith.*

[8] Mark Benjamin & Nicholas M. Horrock, "Senator Gramm's Wife Gets Enron Subpoena," *UPI Washington Politics & Policy Desk*, January 13, 2002.

[9] "The Role of the Board of Directors in Enron's Collapse," U. S. Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, Report. No. 107-70 at 55, July 8, 2002.

[10] Garance Franke-Ruta, "Bull Market," *Washington City Paper*, March 8-14, 2002.

[11] "The Role of the Board of Directors in Enron's Collapse," U. S. Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, Report. No. 107-70 at 51, July 8, 2002.

[12] Their comments included: Wendy Gramm, "Proposed Rules Relating to a New Regulatory Framework for Multilateral Transaction Execution Facilities, Intermediaries and Clearing Organizations, and Exemption for Bilateral Transactions," submitted to the Commodity Futures Trading Commission (CFTC), 08/21/2000**;** Wendy Gramm, "Fast-track Designation and Rule Approval Procedures," submitted to Commodity Futures Trading Commission (CFTC), 12/18/1996; Sharon Brown-Hruska, "Proposed Rules for Registration of Security Futures Brokers-Dealers," submitted to the Securities & Exchange Commission (SEC), 07/26/2001; Jerry Ellig, "Regulation of Short-Term Natural Gas Transport Services," submitted to the Federal Energy Regulatory Commission (FERC), 04/22/1999. Available on-line at http://www.mercatus.org/regulatorystudies/.

[13] Mark Benjamin & Nicholas M. Horrock, "Senator Gramm's Wife Gets Enron Subpoena," *UPI Washington Politics & Policy Desk*, January 13, 2002 (available on-line at http://www.upi.com/print.cfm?StoryID=11012002-075635-2222r, visited on November 7, 2002). *See also Blind Faith.*

Enron's investment in politics paid off richly in tax breaks and weakened regulations. In 1990, Senator Gramm specifically mentioned Enron when explaining his decision to support a tax credit for drilling in tight sand wells.[14] Senator Gramm also championed Enron's early efforts to force states to deregulate their electricity markets, sponsoring a 1997 "full-blown deregulation" measure with U.S. Rep. Thomas Bliley (R-Va.).[15]

In 2000, Senator Gramm co-sponsored legislation to reauthorize and amend the CFTC's authorizing statute.[16] The bill was introduced in the chaotic days after the Supreme Court sealed George W. Bush's victory in the disputed 2000 presidential election. Unknown to most Americans, buried in the bowels of the finally enacted bill was a provision that allowed Enron to operate an unregulated energy trading subsidiary. Uninhibited by bothersome transparency and accountability requirements, this provision allowed Enron to command far more market share than it had previously. In the days after the law took effect, California was plunged into a month-long nightmare of rolling blackouts.[17]

[14] Bill Mintz and Anne Pearson, "Budget Deal Rekindles Gas Plans," *Houston Chronicle*, October 2, 1990.

[15] "Senator Gramm Working with Representative Bliley on 'Full-Blown Deregulation' Measure," *Electric Utility Week*, May 5, 1997.

[16] S. 3283, 106th Congress (2000).

[17] From *Blind Faith*.

APPENDIX E

Dudleynomics in Action

All the rules are different in Dudleynomics. We have already seen how Dudleynomics redefines "market failure" in ways that depart dramatically from the mainstream of economic thought.

Did you know that Dudleynomics also changes the rules of basic mathematics?

Witness this complaint from Dudley's comments on OIRA's 2004 report to Congress on the costs and benefits of regulations. Here, she is complaining again that the costs of regulations are much higher than OIRA has estimated.

> issuing agencies estimated benefits or costs for only six.
>
> These statistics highlight several problems with relying solely on information reported by agencies. The most obvious is the lack of information on the impacts (costs and benefits) of the major rules issued last year. By definition, an economically significant or major rule has an annual impact of $100,000,000 or more,[6] yet costs are presented for only fifteen percent of these rules. If each of the 31 rules not included in OMB's total imposed the minimum cost of $100,000,000 per year, the totals would be understated by $31 billion.
>
> Furthermore, there are real costs associated with regulations that effect large "transfers"

Of course, in the world without Dudleynomics, the numbers work a little differently:

$100 million x 31 = $3.1 billion

Source: Dudley, Public Interest Comment on the Office of Management and Budget's 2004 Draft Report to Congress on the Costs and Benefits of Regulation, p. 3.