

the back door to POWER



The Door Is Wide Open

President Bush announced on April 4, 2007 that he was giving a recess appointment to **Susan Dudley**, crowning her the role of **administrator of the Office of Information and Regulatory Affairs (OIRA)** in the Office of Management and Budget.

Although the leader of the Senate committee with jurisdiction over the nomination promised to give Dudley a fair hearing, President Bush decided not to face up to Dudley's controversial record. Instead, he snuck her into office through the backdoor — not once, but twice — giving her power to weaken and delay all regulatory protections.

About the Position: Why It Matters

The OIRA administrator has enormous power to change, weaken, and delay protections of the public health, safety, civil rights, privacy, environment, and consumers — power Congress never gave that office.

Congress created OIRA in 1980 with the Paperwork Reduction Act, which charged OMB with implementing several information policy duties, such as promoting public access to information, coordinating statistical policies, reviewing agency mandates for information collection and reporting, and overseeing information security, privacy, and technology.¹

From the very beginning, OIRA has failed to meet crucial obligations in information security and information technology, focusing instead on interfering with substantive policymaking.²

OIRA gained enormous new powers over regulation — not by law, but by executive fiat. In 1981 the Reagan

administration issued Executive Order No. 12,291, which gave OIRA the **power to review all federal regulations**, proposed or final, and order changes to be made before they could be published in the *Federal Register*. The review power was slightly modified in 1993 with Exec. Order No. 12,866, which limited the scope of required review from all regulations to only “significant” regulations.

The OIRA administrator gained even more breathtaking power in 2007, when the Bush administration amended Exec. Order No. 12,866. Now, the OIRA administrator can review not only drafts of significant regulations but **also drafts of significant “guidance documents,”** an amorphous category of information that the Bush order and an accompanying bulletin define to include essentially any information (including not just interpretations of rules but also scientific and technical information, such as risk assessments) that the White House decides it wants to influence.³

OIRA administrators have used these powers to weaken and delay much-needed protections, to the public's detriment.⁴ In so doing, OIRA administrators have sometimes ordered agencies to contravene the law,⁵ raising questions about administrative and constitutional law that beg for congressional oversight.⁶

About Dudley: Controversial Recess Appointee

Dudley is an anti-regulatory extremist best known for her work at the industry-funded think Mercatus Center, based at George Mason University.

While at Mercatus, Dudley filed comments and wrote articles about a range of regulatory topics, displaying a consistent hostility to regulatory protections of the public interest.

The Dudley Timeline

109th Congress

- Aug. 1, 2006: Nominated
- Nov. 13, 2006: Senate Committee on Homeland Security and Governmental Affairs (HSGAC) holds confirmation hearing
- Nov. 21, 2006: More than 100 public interest groups call on Senate to reject nomination
- Dec. 6, 2006: HSGAC Chair Sen. Susan Collins tells press Dudley nomination is not leaving committee, and re-nomination in 110th Congress “would not be a good use of the committee’s time”

110th Congress

- Jan. 5, 2007: BNA’s Daily Report for Executives breaks news that Bush intends to designate Dudley a “senior advisor,” reporting directly to the OMB Director
- Jan. 9, 2007: Pres. Bush again nominates Dudley
- Jan. 30, 2007: Dudley begins work as “senior advisor”
- April 4, 2007
 - *Morning*: HSGAC spokesperson is quoted in Washington Post that the committee “is moving forward in the traditional manner with her nomination” and plans a new hearing
 - *Afternoon*: White House announces recess appointment

Dudley’s record is detailed more extensively in the Public Citizen/OMB Watch report *The Cost Is Too High: How Susan Dudley Threatens Public Protections*.⁷ Among the key points about her record:

- **She will demand the impossible from agencies.** Dudley will demand that agencies justify the need for a regulation — but she what she will expect from the agencies will be impossible to satisfy. For example, she will expect proof of market failure... but, in her view, markets never fail.⁸
- **She has a tendency to uncritically accept anti-regulatory talking points.** Industry groups and the think tanks they fund produce reams of junk science and even junkier economics to disprove the need for regulatory safeguards. Dudley has a record of swallowing it hook, line, and sinker. Case in point: she relied on obviously bogus industry studies to argue that smog is good for you, and that EPA should thus not reduce ground-level ozone emissions.⁹
- **She is intellectually inconsistent in order to be consistently anti-regulatory.** For example, she has often argued that more information is a superior response to problems than regulation... except when it comes to programs like the Toxics Release Inventory, which simply requires industry to *report* the toxics they emit in our back yards.¹⁰

Through the Back Door to Power

Dudley was originally nominated in the 109th Congress, but the Senate opted not to allow the nomination to leave committee. Bush then resubmitted the nomination in the 110th Congress, put her in power unofficially as a “senior advisor” in January, and then proclaimed her the OIRA administrator in a recess appointment **on the same day that Sen. Lieberman announced he planned a confirmation hearing.**

In so doing, the White House evaded the Senate’s constitutional role of advice and consent and demonstrated a lack of faith in Dudley’s ability to win a confirmation on

the merits. Instead of facing up to Dudley’s record and the prospect of significant harm to the public from a Dudley-led OIRA, Pres. Bush simply handed her this enormously powerful office.

We need Congress to keep an eye on Dudley and the workings of OIRA. The threat is too grave.

¹ For a summary overview of the PRA, see OMB Watch, *Issue Brief: More Than Paperwork*, available at <<http://www.ombwatch.org/article/articleview/3311/1/361>>.

² See J. Robert Shull, Testimony Before the Subcomm. on Regulatory Affs., Comm. on Gov’t Ref., U.S. House, on Reauthorization of the Paperwork Reduction Act, Mar. 8, 2006, at 1, 6-10, available at <<http://www.ombwatch.org/article/articleview/3324>>.

³ For more about the new order and bulletin, see Public Citizen, *Executive Order 13,422 and Bulletin on Guidance*, available at <<http://www.citizen.org/autosafety/regs/whitehouse/guidance2007/>>.

⁴ For more information, see Public Citizen, *Risking America’s Health and Safety: George Bush and the Task Force on Regulatory Relief* (1988), available at <<http://www.citizen.org/documents/risking-americas-health-and-safety.pdf>>; OMB Watch & Ctr. for Amer. Progress, *Special Interest Takeover: The Bush Administration and the Dismantling of Public Protections* (2004), available at <<http://www.sensible safeguards.org/sit.phtml>>; OMB Watch, *Web Feature: The Graham Files* (2005), available at <<http://www.ombwatch.org/regs/grahamfiles>>.

⁵ See, e.g., Public Citizen, Inc. v. Mineta, 340 F.3d 39 (2003) (rejecting NHTSA rule on tire pressure monitoring systems as contrary to intent of law); OMB Watch, *In Rejecting NHTSA Rule, Graham Shows True Colors*, OMB WATCHER, May 15, 2002, available at <<http://www.ombwatch.org/article/articleview/739/1/132>> (detailing OIRA interference).

⁶ Some recent scholarship in the area includes Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORD. URB. L.J. 101 (2006), and Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

⁷ Available at <<http://www.citizen.org/dudley>>.

⁸ See *id.* at 15-28.

⁹ See *id.* at 19-20, 26.

¹⁰ See *id.* at 25-28.