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Sally Katzen and Michael Fitzpatrick *

During the George W. Bush Administration, there has been extensive coverage in the media about government agencies that have failed to protect the public, provide needed services, or simply carry out governmental responsibilities that were authorized or required by Congress – from the woefully insufficient response to Hurricane Katrina to the ineffectual Iraqi reconstruction. And there are a host of other examples where government has failed to perform – many of which were not covered at all or were one-day stories at best. What has been happening to the federal government? And what can be done to put the federal agencies back on the right path to do the job that the American people want, indeed, expect: to function efficiently and effectively to serve and protect our citizens?

The decline in confidence in our government agencies over the last eight years should not be surprising. Conservatives have traditionally called for a smaller federal government. During the Bush Administration this credo has played out particularly in those federal departments and agencies that address domestic issues. The combination of tax cuts (resulting in less total revenue for the government) and increased spending for defense and national security has meant that the rest of the government (the so-called domestic discretionary functions) has had to curb their activities, whether they be restoring the infrastructure in our national parks or our transportation systems (including tunnels and bridges) or enforcing our health, environmental, labor, and antitrust laws. A corollary of this conservative credo is that if governmental activities cannot be ended, then delay them by making it more difficult for the federal government to function.

What can be done to reverse this phenomenon, restore confidence in our government agencies, and ensure that they are able to carry out their responsibilities to protect and serve the American people? This question is critical because the federal government is emphatically part of the solution to the problems confronting this country. The government has a role to play that cannot be played by any other entity – from ensuring that the air we breathe and the water we drink are clean, our food and drugs are safe and effective, our markets are fair and competitive, our financial institutions sound, and our borders (as well as our civil rights) are secure, to name just a few. Bureaucrat bashing may make for good 30-second sound bites, but it does not make the government function better. Instead, as we describe more fully below, the new Administration must once again trust and respect the agencies' work and the extraordinary civil servants who perform it. This means appointing political leadership that will embrace the career staff and develop an open, collaborative relationship that benefits from the experience, varied

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perspectives, and expertise of the staff. This is particularly crucial where the agency's mandate is rooted in scientific endeavors, whether they be in the physical or natural sciences; all too often over the past eight years, science has taken a back seat to ideology and politics to the detriment of the public interest. In addition, the people to whom we have entrusted the responsibility for doing the job must be given the financial and other resources to carry out their missions. In the first instance, it means not artificially shrinking the workforce through privatization, but rather returning to an approach to competitive outsourcing that ensures that core governmental functions are fulfilled by experienced and expert agency staff, and that where commercial functions are opened to market forces, the agencies retain the capacity for effective oversight. Finally, a new Administration must provide the agencies with resources commensurate with their responsibilities and not insist that they do more and more with less and less.

Given the huge array of federal agencies, and their varied missions, it would take many volumes to explore this subject fully. There is, however, a subset of agencies – often referred to as the “regulatory agencies” – that can serve as a case study for what has gone wrong over the past eight years and what might be fixed so that agencies can do the jobs they were created to do. Regulatory agencies include those entities whose mission is to protect the nation's health, safety, and natural resources – for example, the Environmental Protection Agency (EPA), the Department of Transportation (DOT), the Food and Drug Administration (FDA), the Occupational Health and Safety Administration (OSHA), and the Department of the Interior. To a great extent, the lessons learned from these regulatory agencies are applicable to other agencies, from the National Aeronautics and Space Administration (NASA) and the National Oceanic and Atmospheric Administration (NOAA), to the U.S. Army Corps of Engineers, to the bureaus in the Agriculture Department that administer our farm subsidy programs.

I. Supporting the People Doing the Work

A. Finding the Right People for the Right Job

At the risk of oversimplification, the regulatory agencies were created to carry out – that is, to implement – the laws passed by Congress and signed by the President. These laws usually set forth general principles, goals, or objectives, as Congress has neither the time nor the expertise (nor, on occasion, the political will) to delve into the details and set forth the specifics of each policy pronouncement. Congress can assert that pollutants should be reduced to a “level requisite to protect the public health,”¹ or that motor vehicle safety standards must be “reasonable, practicable, and appropriate for the particular type of motor vehicle,”² but Congress typically does not designate the specific ambient air quality standard for ozone or spell out the precise technical specifications on how airbags should properly inflate in an accident. Instead, Congress delegates to the regulatory agencies (EPA in the first example above; DOT in the second) the obligation and responsibility for filling in the statutory gaps and developing the details that give effect to congressional intent.

To fulfill these obligations and responsibilities, the regulatory agencies are staffed with civil servants who are highly knowledgeable about the technical, scientific, economic, and legal

¹ Clean Air Act of 1970, 42 U.S.C. §§ 7401-7671q (2006).

² National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. 30111(b)(3) (2006).

intricacies of the statutes they administer and the regulatory programs they develop and enforce. The original (and continuing) conception was that fleshing out agreed-to policy should be done by neutral, objective, and experienced staff rather than by avowedly political players. Accordingly, the civil servants that staff the agencies are selected on the merits and serve from administration to administration. They provide the institutional memory, the analytical horsepower, and the non-partisan glue that holds the institution together through changes in power from one political party to another. Contrary to the stereotypical “bureaucrats” so often bashed as sport in Washington and in the national media, most career civil servants are dedicated professionals who have chosen to serve their country, passing over more lucrative careers in the private sector.

Not surprisingly, there is often a natural tension between these career civil servants and the political appointees selected by the President to run the agencies. New political appointees arrive with each new President and often turn over several times during the course of an administration. While they certainly bring their own skills, experiences, and talents, these appointees are often uninterested in, or even hostile to, projects and programs already underway at the agency (particularly those begun during a previous administration of another party), and are frequently suspicious of the senior career employees who have served under many Presidents. Such suspicions have generally been more pronounced in Republican Administrations, owing to conservatives’ greater disdain for, and distrust of, the federal government and their belief that the private sector is inherently superior in most respects.

Nevertheless, it is generally accepted that political appointees are at the agency to provide policy direction and priority setting that reflects the mandate of the electorate (that is, the President’s agenda) and the requirements of the law. Setting the agencies’ policy direction, or attempting the more difficult task of changing it, presents political appointees with tremendous challenges.³ Rerouting an agency, with the investments made in policies and programs by both its staff and stakeholders, is not unlike trying to turn a large supertanker quickly in a narrow strait. The best recipe for success in setting and implementing new policies is for the political appointees to quickly develop a collegial, respectful, and collaborative relationship with the career staff. All too often, it takes political appointees months or even years to realize the value of the agency’s existing human assets, which diminishes the time available – and the ability – to achieve desired policy goals.

It is therefore essential for a new President to choose the right people to fill these political jobs – smart, open-minded, and curious individuals, willing to learn and listen as well as speak. Just as important, the appointees should be ready to roll up their sleeves and earn the respect of the career staff through their temperament, management skills, and willingness to at least consider various perspectives, interpretations, and opinions. Sadly, as is illustrated in greater detail below, these appear not to have been the operative criteria for the selection of many political appointees at the regulatory agencies during the Bush Administration.

³ Those who see the governmental functions of the legislative (the development of policies through lawmaking) and executive (administering policies embodied in laws) branches as mutually exclusive should consider the words of Justice Scalia: “[a] certain degree of discretion and thus of lawmaking, inheres in most executive action.” *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 475 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

The insularity of political appointees has been compounded over the past eight years by another disturbing trend: the number of political appointees has been increasing at a much greater rate than agency staff as a whole. The Volker Commission has noted that President Kennedy had 286 political leadership positions to fill, President Clinton had 914, and President George W. Bush 3,361 – a 15-fold increase at a time when the total number of government personnel was steady or declining.⁴ Paul Light, a noted scholar who has worked extensively in this area, has observed that despite President Bush’s “promise to bring businesslike thinking to the federal government . . . [t]he executive hierarchy has never had more layers or more occupants per layer than it does today.”⁵ Light calls this trend the “thickening of the hierarchy,” which, according to his studies, “has been accelerating much faster than the [government’s] agenda has been growing.”⁶ He attributes this change to “an indelible belief that more leaders equals more leadership,” but adds “[w]hat . . . they fail to realize is that more leaders does not equal more leadership. Rather, more leaders actually weaken government’s capacity to act by diffusing accountability for what goes right or wrong in the faithful execution of the laws.”⁷

Admittedly, some argue that increasing the number of political appointees relative to career staff is necessary to provide sufficient control over the agency’s activities to ensure that the President’s policy preferences are carried out, or is desirable to help prevent “capture” of the senior political appointees by the staff.⁸ But whatever the arguable merits of this position, there are serious adverse consequences to these developments. The more political appointees there are, the more they are prone to gravitate to, to communicate with, and ultimately to trust each other, rather than the career staff. This insulating effect can separate them from the knowledge base and expertise at the agency, heighten staff suspicions about their motives, and undermine much-needed trust, respect, and cooperation between career staff and the political leadership. Such a phenomenon has been exacerbated during the Bush Administration by the practice of placing White House loyalists, with close ties to the President or his White House staff, in each agency, ostensibly to provide a ready channel for information-gathering and communication between the White House and the agency. For example, President Bush has blatantly politicized the role of Regulatory Policy Officers (RPOs) at the agencies by requiring that each RPO be

⁴ NAT’L COMM’N ON THE PUB. SERVICE, URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 18 (2003), *available at* <http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf>. This Commission, chaired by former Federal Reserve Board Chairman Paul Volcker, was convened to explore how to enhance governmental efficiency and increase public confidence in the government. *See also* H.R. COMM. ON GOV’T REFORM, 109TH CONG., THE GROWTH OF POLITICAL APPOINTEES IN THE BUSH ADMINISTRATION, (2006), *available at* <http://oversight.house.gov/documents/20060503160909-97328.pdf>.

⁵ PAUL LIGHT, A GOVERNMENT ILL EXECUTED 58 (Harvard Univ. Press 2008).

⁶ *Id.* at 53.

⁷ *Id.*

⁸ This argument may be difficult to sustain in light of the fact that “politically appointed bureau chiefs get systematically lower management grades than bureau chiefs drawn from the civil service.” DAVID E. LEWIS, POLITICAL APPOINTMENTS, BUREAU CHIEFS, AND FEDERAL MANAGEMENT PERFORMANCES, (2005), *available at* <http://www.princeton.edu/~delewis/Papers/lewisappmgt0806.pdf>. This suggests that a President could achieve more effective control by persuading the career staff of the virtues of his preferred course rather than by installing loyal appointees who shun the career staff.

someone appointed by the President (with or without Senate confirmation).⁹ Under President Clinton, the pertinent requirement was that the RPO be any qualified person reporting directly to the agency head – a Senate confirmed official.

The solution is to select and appoint political leadership at the regulatory agencies that embrace, rather than shun, the career staff. This does not mean they cannot disagree with staff analysis and recommendations – ultimately it is the job of the political appointees to make the right policy calls in light of the facts, the law, and the President’s policy agenda. But the decisions will be better, and the policies and programs more effective, if agency leadership has considered, with an open mind, the candid contributions offered by the career staff.¹⁰

B. Basing Agency Decisions on Sound Science and Facts

Nowhere is this prescription more compelling than in those areas where Congress has decided that decisions should be based on science (e.g., reducing pollutants to a “level requisite to protect the public health”¹¹ or authorizing the marketing of only those drugs that satisfy the “safety and efficacy” test¹²). Reasonable people can and do disagree on policy – for example, whether the government should intervene in what may be seen as a personal decision to wear a seatbelt in a car or a helmet on a motorcycle. But the mortality or morbidity risk of arsenic in drinking water, or e-coli on ground beef, spinach or peppers, should be discernable and, within a limited range, non-controversial. It is therefore essential that agency leadership respect the scientific findings of the agency and base their regulatory decisions on generally accepted facts.

In the recent past, there have been universal and non-partisan calls for basing relevant regulatory decisions on “sound science.” Nonetheless, during the last eight years, science has often taken a back seat to politics, with most unfortunate results. Consider the following types of abuses that have been documented during the Bush Administration.

The first involves the situation in which agencies have been frustrated or even precluded from getting the science right in the first instance. Many health and environmental agencies are advised by congressionally authorized Science Advisory Boards, which serve to peer review the agency’s scientific decisions.¹³ To be credible, a peer review panel must be independent, broadly representative, and unbiased, and most importantly, consist of experts in the relevant field. Yet too frequently, the Bush Administration has removed eminently qualified experts on

⁹ Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007). This amended the previous Clinton Executive Order governing the regulatory review process. Exec. Order No. 12,866 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. at 638-42 (2000).

¹⁰ Similarly, the new agency leadership should resist the natural inclination to “bring their staff” with them, creating a protective cocoon that separates them from the career staff. The sooner the agency’s political leaders develop a relationship of respect, trust, and collaboration with the career staff, the sooner the agency will be in a position to effectively and efficiently carry out its mission on behalf of the American people.

¹¹ The Supreme Court explicitly held in *Whitman v. American Truckers Ass’n* that EPA’s decision regarding the level of pollution is to be based on this health standard and the agency is indisputably precluded from considering costs in setting the requisite level. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 486 (2001).

¹² 21 U.S.C. § 355 (2000); *see also* 21 C.F.R. § 314.50 (2000).

¹³ *See, e.g.*, 42 U.S.C. § 4365 (2000) (establishing the EPA Science Advisory Board); *see also* 42 U.S.C. § 7409(d)(2) (2000)(establishing the EPA Clean Air Scientific Advisory Committee); 42 U.S.C. § 7612 (2000)(establishing the EPA Advisory Council on Clean Air Compliance Analysis).

various scientific advisory panels, replacing them with individuals whose only apparent qualifications are well-publicized ideological positions supported by the Administration. For example, in 2003, members of a team of federal biologists indicated that the Army Corps of Engineers was violating the Endangered Species Act in managing the flow of the Missouri River; the group was subsequently replaced by an industry friendly panel.¹⁴ Similarly, in February 2004, Dr. Elizabeth Blackburn, a distinguished cell biologist, and Dr. William May, a prominent medical ethicist, both of whom had disagreed with the Bush Administration's stem cell policy, were dismissed from the President's Council on Bioethics.¹⁵ In their places, President Bush appointed three new members, including a doctor who called for more religion in public life, a professor of political science who had spoken out precisely against the research that the dismissed members supported, and a professor of government who has written about the immorality of abortion and the "threats of biotechnology."¹⁶ The result of actions such as these is that sound science is suppressed and the agencies themselves do not receive solid technical information on which to base their decisions.

A second and related example of playing politics with science has occurred where agency personnel develop good science, but it is then suppressed from public dissemination – again, not because there is a valid science-based dispute about the facts, but rather for political reasons. Recently the Union of Concerned Scientists conducted a survey of scientists at EPA – including those trained in geology, engineering, life science, toxicology, and chemistry – and reported that over half of those interviewed “had witnessed political interference in scientific decisions at the agency during the past five years.”¹⁷ Examples ranged from observing the selective use of data to justify a pre-determined regulatory outcome to receiving directions from political appointees “to inappropriately exclude or alter technical information in EPA scientific documents.”¹⁸ Another recent report from the NASA Inspector General concluded that while political suppression of scientific information about global warming from NASA and NOAA – two of the government's lead agencies on climate change issues – “did not extend to the research itself or its dissemination through scientific journals and conferences,” the political appointees in NASA's public affairs office “worked to control and distort *public* accounts of its researchers' finding about climate change for at least two years.”¹⁹ The report explicitly charged the political officials with operating in a way that “reduced, marginalized, or mischaracterized climate change science made available to the general public.”²⁰ Such a pattern and practice of manipulating or suppressing science when it is inconsistent with political ideology is

¹⁴ Robert F. Kennedy, Jr. *The Junk Science of George W. Bush*, THE NATION, March 8, 2004, available at <http://thenation.com/doc/20040308/kennedy/print>. See also, e.g., CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE (Basic Books 2005); SETH SCHULMAN, UNDERMINING SCIENCE: SUPPRESSION AND DISTORTION IN THE BUSH ADMINISTRATION (Univ. of Cal. Press 2008); DIANA DEGETTE, SEX, SCIENCE, AND STEM CELLS (Lyons Press 2008); Heather Boonstra, *Critics Charge Bush Mix of Science and Politics is Unprecedented and Dangerous*, GUTTMACHER REPORT ON PUBLIC POLICY, May 2003, at 1, available at <http://www.guttmacher.org/pubs/tgr/06/2/gr060201.html>.

¹⁵ Rick Weiss, *Bush Ejects Two From Bioethics Council*, WASH. POST, Feb. 28, 2004, at A6.

¹⁶ *Id.*

¹⁷ Christopher Lee, *Scientists Report Political Interference*, WASH. POST, April 24, 2008, at A19.

¹⁸ *Id.*

¹⁹ Juliet Eilperin, *Climate Findings Were Distorted, Probe Finds*, WASH. POST, June 3, 2008, at A2 (emphasis added).

²⁰ *Id.* (quoting NASA Office of the Inspector General Investigative Summary).

extraordinarily troubling. Citizens cannot fulfill their role in a democracy when truthful, relevant information is deliberately withheld from them.

The third variation of this disturbing phenomenon has occurred when agencies have determined and published their scientific findings, only to have the agency's political leadership or The White House ignore the science and make the decision based on political considerations. For example, in May 2004, the Food and Drug Administration rejected the over-the-counter sale of the morning-after pill ("Plan B"), contradicting the overwhelming vote of the agency's scientific advisory committee, as well as the professional judgment of FDA scientists and the consensus of scientific experts.²¹ More recently, the Clean Air Scientific Advisory Committee (CASAC), a group of expert outside scientists who advise the EPA Administrator on air quality standards, unanimously recommended that EPA issue an ozone standard no greater than 0.070 parts per million (ppm).²² The EPA Administrator, however, adhering to last minute instructions from the White House, rejected the scientists' recommendation and announced a new standard of 0.075 ppm.²³ Such political decisionmaking not only prevents regulatory actions from being based on sound science, as intended by Congress, but erodes the public's confidence in its own government institutions, a terrible result for democracy.

The solution is similar to that suggested in the previous sub-section: appointments to the agencies' political leadership and advisory boards must be based on the merits – expertise and respect for the process – not on some political litmus test. Again, this does not mean that there is no room for policy input and priority-setting throughout the government – that is the natural consequence of elections. But where decisions are to be made not on policy grounds, but on the scientific and technical merits, the merits should prevail, not political expediency.

II. Providing Adequate Resources So That Agencies Can Do Their Jobs

A. Ensuring There Are Resources Commensurate With Responsibilities

It is clear that it takes qualified people at the agencies to complete the tasks that Congress has delegated to them. Yet while that is necessary, it is not sufficient, for those people need the resources to do the job asked of them, and as their responsibilities or obligations increase, the resources allocated to these functions must increase. Regrettably, that has not been the reality for the regulatory agencies.

In fact, with the exception of the Department of Homeland Security (and a few other Bush Administration priorities), the regulatory agencies have been virtually flat-funded or given modest increases that are hardly enough to cover inflation.²⁴ At the same time, over the past eight years, the Bush Administration has imposed on the regulatory agencies, in rapid succession, a series of significant procedural and analytical requirements in addition to pre-

²¹ Gardiner Harris, *U.S. Rules Morning-After Pill Can't Be Sold Over the Counter*, N.Y. TIMES, May 7, 2004, at A1.

²² Juliet Eilperin, *Ozone Rules Weakened at Bush's Behest*, WASH. POST, March 14, 2008, at A1.

²³ *Id.*

²⁴ See VERONIQUE DE RUGY & MELINDA WARREN, REGULATORY AGENCY SPENDING REACHES NEW HEIGHTS: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2008 AND 2009, (Mercatus Center, George Mason University and Weidenbaum Center, Washington University 2008), available at http://wc.wustl.edu/09-regulator/wc-regulators_budget_09.pdf.

existing requirements. Although each new set of requirements arguably is designed to improve the quality and efficiency of agency actions and decisionmaking, in the aggregate they have imposed a huge burden on already overstretched regulators. Whether intended or not, the result is the same – to hinder and slow agency decisionmaking in the same way one might slow down a racehorse by putting weights in the jockey’s saddle.

To be sure, federal agencies have not historically been left to their own devices, notwithstanding the respect for their expertise. In 1946, Congress enacted the Administrative Procedure Act (APA) to ensure that agency decisionmaking was subject to basic procedures that would constrain the latitude and power of administrators.²⁵ The APA’s requirements were intended to ensure an opportunity for citizen input on agency actions, adequate transparency in the process, and some level of accountability to the public. Thus, agencies engaging in rulemaking are required to provide public notice of their proposed actions, in as much detail as possible, along with the data and analysis on which they relied. The public – those expected to be benefited as well as those burdened by the regulatory proposal – then has an opportunity to provide comments supporting or challenging the agency’s data and analysis, offering new information, insights, or perspectives, or proposing alternative “solutions.”

In the late 1970s and early 1980s, there was a shift from externally focused procedures designed to encourage public participation in the agencies’ rulemaking processes to more internally focused requirements on how agencies themselves should arrive at their decisions. Thus, in a series of Executive Orders, agencies were first encouraged and then required to thoroughly and systematically evaluate and analyze the costs and benefits of their regulatory proposals, quantifying (and monetizing) to the greatest extent possible both the costs and benefits.²⁶ While cost-benefit analysis is not universally acclaimed, most who have studied the issue (from liberals to conservatives) are generally persuaded of the merits of such analysis. They acknowledge that properly done, such analysis can identify regulatory solutions that achieve equal benefits for less cost, or more benefits for the same cost.²⁷ But such analysis is itself *not* cost-free – significant time and money, often in short supply at agencies, must be expended to do it right. The same is true for the requirements imposed in the late 1990s by the Republican Congress; among other things, statutes such as the Unfunded Mandates Reform Act of 1995²⁸ and the Small Business Regulatory Enforcement Fairness Act of 1996²⁹ have expanded the scope of consultations and expanded the types of analyses agencies must undertake before issuing proposed or final rules.

It is in this context that the Bush Administration took at least five significant steps to increase the procedural and analytical requirements at regulatory agencies, particularly those engaged in developing environmental, health, and safety regulations. While each may have salutary characteristics and objectives, without the additional resources required to carry them

²⁵ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2262-63 (2001).

²⁶ *See, e.g.*, Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981) (Reagan); Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (Clinton).

²⁷ *See, e.g.*, RICHARD REVEZ & MICHAEL LIVERMORE, *RETAKING RATIONALITY* (Oxford Univ. Press 2008); STEVEN CROLEY, *REGULATION AND PUBLIC INTERESTS* 254-55 (Princeton Univ. Press 2008).

²⁸ 2 U.S.C. §§ 1501-71 (2000).

²⁹ 5 U.S.C. §§ 801-08 (2000).

out, these measures have imposed on agencies significant new burdens and inhibited their ability to fulfill their missions.

- In February 2002, the Office of Management and Budget (OMB) issued guidelines intended to ensure the quality, accuracy, and objectivity of information released by agencies.³⁰ These guidelines imposed new, stringent requirements governing the release of “influential information” (a newly created category) and established a mechanism through which individuals and organizations could challenge and seek to correct information to which they object. Industry groups (including the U.S. Chamber of Commerce) viewed this ability to challenge data they viewed as questionable as having a “revolutionary impact” on the regulatory process. Agencies must now receive, review, and adjudicate (including administrative appeals) each of these complaints, and provide regular reports to OMB.
- In September 2003, OMB led an effort to establish uniform government-wide standards for peer review of scientific data used by regulatory agencies.³¹ Leading scientific organizations (for whom peer review is the gold standard), as well as citizen advocacy groups and former government officials, all strongly objected to the proposed standards as unduly prescriptive and tilted in favor of industry. Eventually, the standards were modified to make them less restrictive – nevertheless, the peer review box remains one that must be checked by an agency before issuing a regulation.
- In 2004, OMB replaced Clinton-era guidance to agencies regarding the regulatory analysis that must accompany significant draft proposed and final rules with a 50-page, single-spaced OMB Circular that includes far more detailed and prescriptive requirements regarding the documentation necessary to justify a regulatory action. Though it is still called “guidance,” agencies departing from the Circular’s prescriptions do so at their peril.
- In January 2006, OMB proposed technical guidance for the risk assessments developed by agencies to support rulemakings.³² The guidance Bulletin originally proposed an elaborate set of mandatory standards for such assessments. As with OMB’s foray into peer review standards, there was substantial opposition to the proposed risk assessment guidance and OMB asked the National Research Council of the National Academy of Science (NAS) to comment on the draft Bulletin. The NAS panel found it to be “fundamentally flawed” and

³⁰ 67 Fed. Reg. 8452 (Feb. 22, 2002).

³¹ OFFICE OF MGMT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, PROPOSED BULLETIN ON PEER REVIEW AND INFORMATION QUALITY, 68 Fed. Reg. 54023-02 (Sept. 15, 2003), *available at* http://www.whitehouse.gov/omb/inforeg/peer_review_and_info_quality.pdf.

³² OFFICE OF MGMT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, PROPOSED RISK ASSESSMENT BULLETIN, http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf (last visited Sept. 19, 2008).

recommended that it be withdrawn.³³ It was ultimately replaced with a more modest set of principles that agencies must apply.³⁴

- Finally, in January 2007, OMB imposed new “Agency Good Guidance Practices” to govern the growing number of guidance documents being issued by regulatory agencies to inform the public of, and provide direction to agency staff about, agency policies on the interpretation and enforcement of regulations.³⁵ The OMB practices include detailed procedural requirements on how such guidance should be developed and communicated to the public, thereby making the process of issuing guidance more burdensome and time consuming.³⁶

While each set of requirements can be justified as helping to produce better regulatory decisions, the cumulative effect is overwhelming. Requirements have been piled on requirements, which are piled on still more requirements that the agencies must satisfy before they can issue the regulations or significant guidance documents authorized or mandated by Congress. And despite these significant new burdens, agencies have not been given any additional resources to help them through, even as they struggle to carry out their original assessments and fulfill preexisting requirements imposed by earlier statutes and Executive Orders. In short, agencies must now do more with appreciably less, resulting in fewer issued regulations – exactly the result many believe the Bush Administration and some in the business community desire. If agencies are not to be paralyzed by these myriad new procedural and analytical requirements, they must be provided the resources necessary to do their jobs.

B. Avoiding Artificially Shrinking the Size of the Workforce Through Privatization

Another manifestation of the Bush Administration’s apparent lack of respect for the expertise and capabilities of federal agencies is the move it has made to privatize huge swaths of government functions. Simply put, it has taken core government functions out of the hands of public servants and entrusted them to private sector contractors without providing the government with adequate capacity to oversee or hold these contractors accountable. The results have not been good.

Competitive outsourcing, properly implemented, arguably has merit, and it has been supported in one form or another by Democratic and Republican Administrations for over 40 years. The key federal guidance on outsourcing, OMB Circular A-76, first issued in 1966, was

³³ COMM. TO REVIEW THE OMB RISK ASSESSMENT BULLETIN, NAT’L RESEARCH COUNCIL, SCIENTIFIC REVIEW OF THE PROPOSED RISK ASSESSMENT BULLETIN FROM THE OFFICE OF MANAGEMENT AND BUDGET 1 (2007), *available at* <http://books.nap.edu/catalog/11811.html#toc>.

³⁴ Memorandum from Susan E. Dudley, Adm’r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, and Sharon L. Hayes, Assoc. Dir. & Deputy Dir. for Sci., Office of Sci. & Tech. Policy, to the Heads of Executive Departments & Agencies, Updated Principles for Risk Analysis 1–2 (Sept. 19, 2007), *available at* <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-24.pdf>.

³⁵ Memorandum from Rob Portman, Office of Mgmt. & Budget, to the Heads of Executive Dep’ts & Agencies, Issuance of OMB’s Final Bulletin for Agency Good Guidance Practices (Jan. 18, 2007), *available at* <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf>.

³⁶ Ironically, this may have unintended and unwanted consequences for regulated entities, which often request guidance from an agency, and value receiving clarification of their legal duties and responsibilities, as well as some level of protection from arbitrary or inconsistent enforcement by agency staff.

based on the premise that while *inherently governmental activities* should be performed by government employees, taxpayers will receive the most for their dollars if *commercial activities* performed by the government (such as transportation, food, maintenance, and cleaning services) are subject to competitive forces.³⁷ But what was originally introduced as a tool for cost-effective management of the government has been transformed into a powerful tool to *limit* government, to reduce its accountability to the people, and in some experts' estimation, to increase rather than decrease overall costs.

President Bush's enthusiasm for outsourcing seems motivated, at least in part, by the conservatives' view that the private sector inherently does things better than the government, a debatable position to be sure when one looks at the endless stream of corporate scandals and examples of massive cost-overruns on government contracts that have been reported over the past decades.³⁸ In any event, the result of this unprecedented effort has been to cede core government responsibilities previously performed by public servants to private companies. Examples abound, from security services and reconstruction in Afghanistan and Iraq to the post-Hurricane Katrina rebuilding process in New Orleans.³⁹

This phenomenon has been particularly pernicious at the regulatory agencies entrusted with protecting our health, safety, and environment, where such fundamental responsibilities as rulemaking and the enforcement of existing rules have been contracted out to the lowest private sector bidder. EPA has not only outsourced the review and digesting of the submissions filed during the public comment period, but also the drafting of the statement of reason and basis for the final rule – the intellectual underpinnings of the regulatory action and the very essence of a governmental function.⁴⁰ Indeed, it appears that the EPA has simply delegated to private contractors all decisional power for implementing the Superfund Program: “Contractor personnel drafted regulations and memos, recorded decisions and filed reports, trained other contractor personnel, evaluated their performance, responded to Congressional inquiries, and wrote annual reports.”⁴¹ And it is no secret that the Internal Revenue Service has outsourced the collection of delinquent taxpayer debts to private contractors. These are only a few examples of what has become almost commonplace among agencies strapped for funds, restricted in their own manpower counts, and led by political appointees who may be hostile to the agencies' missions.

It is critical that the next Administration signal early on that these developments will be reversed and sensible competitive sourcing principles will be implemented. Core governmental

³⁷ OMB Circular A-76 establishes Federal policy regarding the performance of federal activities by commercial firms. The Circular details procedures for cost comparisons to determine whether federal functions determined to be commercial activities should be performed under contract with commercial sources or performed in-house using Federal resources and personnel. The Circular was revised in 1967, 1979, 1983, 1992, 1996, 1999, and 2003. Copies of updated versions are available at http://www.whitehouse.gov/omb/circulars/a76/a76_rev2003.pdf.

³⁸ See, e.g., Leslie Wayne, *Pentagon Struggles With Cost Overruns and Delays*, N.Y. TIMES, July 11, 2006, at C2 (noting that the costs relating to the military rocket launching program increased from \$15.4 billion to \$28 billion); Ed Friedrich, *Navy Investigating Company It Partnered With to Build Homes*, KITSAP SUN, August 13, 2008 (noting that the contract to build and manage military housing was \$14 million over budget).

³⁹ See, e.g., H.R. COMM. ON GOV'T REFORM, WASTE, FRAUD, AND ABUSE IN HURRICANE KATRINA CONTRACTS, (2006), available at <http://oversight.house.gov/documents/20060824110705-30132.pdf>.

⁴⁰ PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 45-46 (Cambridge Press 2008).

⁴¹ *Id.* at 48 (quoting CHARLES GOODSSELL, *THE CASE FOR BUREAUCRACY* 147 (4th ed., CQ Press 2004)).

functions (e.g., the development, drafting, and enforcement of federal regulations) should be carried out by public servants, and where outsourcing occurs, the agency must retain the capacity to carry out meaningful oversight of those activities. Too often during the Bush Administration, when a government function has been outsourced, the agency's workforce is reduced to the point where it lacks the experienced personnel necessary to effectively monitor the outsourced activities. The result is predictable – a failure to ensure efficiency, prevent fraud and abuse, and hold outside contractors accountable.

III. Conclusion

It should come as no surprise that during the Bush Administration confidence in government agencies has declined and that many agencies are carrying out their missions less effectively. This is to be expected when agency management does not fully respect the talent, experience, and dedication of the majority of the workforce, when politics and ideology are permitted to intrude on science- and fact-based decisions to a degree unseen in previous administrations of both parties, and when agencies are asked to do more with fewer resources. A priority of the new Administration must be to embrace the critical missions of the agencies and to restore our trust in government by providing agencies with sufficient support and resources to perform effectively on behalf of the American people. While certainly not a complete list of remedies, the solutions set forth above would go a long way towards achieving this goal.