



THE PEOPLE'S AGENTS

and the Battle to Protect the American Public

SPECIAL INTERESTS, GOVERNMENT, AND THREATS

TO HEALTH, SAFETY, AND THE ENVIRONMENT

RENA STEINZOR & SIDNEY SHAPIRO



The People's Agents and the Battle to Protect the American Public

*Special Interests, Government, and Threats
to Health, Safety, and the Environment*



RENA STEINZOR AND
SIDNEY SHAPIRO

THE UNIVERSITY OF CHICAGO PRESS

CHICAGO AND LONDON

RENA STEINZOR is professor at the University of Maryland Law School and the author of *Mother Earth and Uncle Sam: How Pollution and Hollow Government Hurt Our Kids*.

SIDNEY SHAPIRO is University Chair in Law and Associate Dean for Research and Development at Wake Forest University. He is coauthor of several books, including *Sophisticated Sabotage: The Intellectual Games Used to Subvert Responsible Regulation*.

The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London
© 2010 by The University of Chicago
All rights reserved. Published 2010
Printed in the United States of America
19 18 17 16 15 14 13 12 11 10 1 2 3 4 5

ISBN-13: 978-0-226-77202-8 (cloth)
ISBN-10: 0-226-77202-0 (cloth)

Library of Congress Cataloging-in-Publication Data

Steinzor, Rena.

The people's agents and the battle to protect the American public : special interests, government, and threats to health, safety, and the environment / Rena Steinzor and Sidney Shapiro.

p. cm.

Includes bibliographical references and index.

ISBN-13: 978-0-226-77202-8 (cloth : alk. paper)

ISBN-10: 0-226-77202-0 (cloth : alk. paper) 1. Public safety—United States. 2. Public interest—United States. 3. Government accountability—United States. 4. Administrative agencies—United States. I. Shapiro, Sidney A., 1947– II. Title.

HD4605.S74 2010

363.1'060973—dc22

2009044288

∞ The paper used in this publication meets the minimum requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992.

The People's Agents and the Battle to Protect the American Public

Preface

Few envy the forty-fourth president or, for that matter, the Congress that serves with him. Confronted by a global economy in deep recession, high unemployment rates, failing industries, wars in Iraq and Afghanistan, the possibility that rogue nations like Iran and North Korea will obtain nuclear weapons, intensifying climate change, and frequent outbreaks of genocide in the developing world, their jobs appear impossibly hard. The enormous energy it will take to respond to these crises pushes more profound reform of domestic government far down on the list of foreseeable priorities. Yet our admittedly idealistic purpose in writing this book is to move such reforms—particularly in the area of protecting public health, safety, and the environment—to the head of the policy-making queue. We think our case is rock solid and our solutions are feasible, giving these issues the opportunity to compete successfully with apparently more urgent priorities.

To make our case, we will focus on the five most important agencies responsible for protecting people and natural resources from anthropogenic threats: the Consumer Product Safety Commission (CPSC), the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and the Occupational Safety and Health Administration (OSHA). These agencies epitomize a pact between government and citizens that dates back to the turn of the twentieth century. The essence of this agreement, which even the harshest critics of regulation have never disowned, is that people should be able to enter the marketplace as consumers, workers, patients, and parents and use the environment's common resources (for example, ambient air, water, and public land), without fearing for their lives or suffering serious injury.

Over the last three decades, the five agencies have achieved remarkable success. During the 1960s and 1970s, rivers caught fire, cars exploded on rear impact, workers breathing benzene contracted liver cancer, and a chemical haze settled over the industrial zones of the country's cities and towns. Today, the most visible iterations of these threats are under control, and millions of people have been protected from death and debilitating injury.

But it is also true that for too many years now, the five agencies have spent a great deal of time resting on their laurels and, more recently, actively backsliding. Powerful external forces have undermined their confidence, not least the withering condemnation of meddlesome bureaucrats and oversized government by every president since Ronald Reagan. This rhetorical disrespect has taken its toll at the same time that a huge gap has developed between the statutory mandates assigned by Congress and the resources Congress and the president make available to carry out those instructions. Ideologues in the White House have second-guessed and micromanaged the judgment of career civil servants to an unprecedented extent. As the agencies shrink in fortitude and capacity, the problems they must address grow ever more complex, requiring them to be at the top of their game, not in a downward spiral.

One obvious example is the complications introduced by a globalized economy. Growing numbers of consumer products are manufactured abroad in factories that operate without any effective regulation. These trends mean that the American civil service has responsibility—but no authority—over large swaths of the marketplace. Another is the sophisticated science confirming our suspicion that we must deal with a global and not a national environment. Finding a way to get oil slicks off the Cuyahoga River was child's play compared with persuading developing and developed countries to negotiate a treaty on reducing the anthropogenic carbon emissions that cause climate change. In a sense, everything that came before was a dress rehearsal for the challenges that now confront us.

Health, safety, and environmental problems are vitally important in their own right, as we will demonstrate throughout this volume. We will also argue that these problems are corrosive to the country's well-being beyond their immediate effects. Because the American people want their government to address these issues effectively and comprehensively, when government fails to do so, its overall credibility is severely undermined.

The nation has engaged in an expansive debate about the role of government in international and domestic affairs. Which missions should we

assign our military in the intensifying regional conflicts breaking out across the globe? Is it the government's job to blunt the worst effects of globalization on American workers and, if so, how? What kind of responsibility should the national government shoulder for helping millions escape poverty? What price will we pay for closing our borders to immigrants and attempting to prosecute the millions here illegally? People are divided, and politicians struggle to walk a middle line, on all of these questions.

In contrast, the public is not at all ambivalent about the government's role in policing dangerous products, drugs, and pollution. People sometimes worry about trade-offs between jobs and protecting the environment, but they also recognize that without regulation, we face serious, irreversible damage.¹ Americans are pessimistic about the state of the natural environment; 35 percent rate it as "fair," while 34 percent say it is "poor," and only 18 percent say it is "good."² By large majorities, Americans think that government intervention to protect the environment should be increased.³

If public support for a strong government role in ensuring health, safety, and environmental protection is so powerful, the converse is also likely to be true: failing to deliver on those expectations undermines people's overall confidence in government. This result occurs precisely because expectations are so high, especially with respect to the safety and purity of food, drugs, and consumer products and the maintenance of clean air and clean water. Or, to put this proposition another way, if the average American thought that she faced significant risk taking over-the-counter or prescription medicine, ordering a hamburger at a fast food chain, shopping at the local toy store, or allowing children to run around an urban playground on a hot summer day, she would blame the government, and not the dozens—even hundreds—of other entities involved in the chain reactions that create such risks. She might also wonder how the government could be so incompetent in the richest and, in its own self-concept, most powerful nation in the world.

Of course, this well-developed national consensus favoring a strong government role in protecting public health, safety, and natural resources wins only half the battle. We acknowledged earlier that to accomplish our goal of pushing the issues addressed here up the list of priorities for a new administration and Congress, pragmatic solutions must be at hand. As we see it, our job is not to write another tract explaining how serious these problems have become—the proverbial marketplace for ideas is glutted with such contributions—but rather to match our diagnosis of the reasons government is in trouble with an agenda of reasonable solutions.

In the pages that follow, we hew to one central theme: to fix government, you must rehabilitate it. We must revive the best American traditions of public service as an honorable, even noble calling. The government must recruit the best and the brightest to become civil servants, it must pay or otherwise compensate them on a par with comparable professionals in the private sector, and it must hold them accountable for their performance. Congress must get back to work, rewriting outmoded laws and adopting new tools for leveraging the best efforts from regulated industries. The courts must revert to a more traditional role, policing agencies to ensure that they stay true to their statutory mandates but not substituting judicial policy judgments for those made by civil service experts.

Grover Norquist, the influential conservative leader of the National Taxpayers Union, once said that he did not want to abolish government but rather simply hoped “to get it down to the size where we can drown it in the bathtub.”⁴ This visceral hostility, generally expressed in more diplomatic, opaque, and therefore confusing language, resonates throughout national politics with a power that is vastly underestimated. Just as the nation needs to move past the destructive polarization that has given its political leaders such convenient places to hide out, avoiding doing the “people’s business” and embracing the most extreme wings of their respective bases, so does this attitude toward government need to change. No one has suggested an alternative to government in resolving the issues that concern us, and no one can reasonably dispute that the people want them solved.

Rena Steinzor

Baltimore, Maryland

Sidney Shapiro

Winston Salem, North Carolina

Acknowledgments

Many people's ideas informed this work. First and foremost, we thank our friends and colleagues at the Center for Progressive Reform (CPR; <http://www.progressivereform.org>), a think tank of fifty-four Member Scholars who are working academics at universities across the country. The rich dialogues CPR has hosted made an important contribution to our work. We are especially grateful for the comments of Shana Jones, Matthew Freeman, Tom McGarity, Chris Schroeder, and Wendy Wagner, as well as the faculties at the University of Maryland and Wake Forest schools of law, each of which held workshops to critique the book as it was being developed.

We are also grateful to our academic institutions for their outstanding, tangible support of our work. University of Maryland research librarians Susan McCarty, Alice Johnson, and Maxine Grosshans provided exceptional cite checking, copyediting, and other research support; we could not have finished without them. Our research assistants—Joey Tsu-Yi Chen, Jay William Frantz, Shana Ginsburg, Marc Korman, Ryan Severson, and Xochitl Strohen—were enormously helpful; most of the detailed factual information in this volume is material they discovered, although they certainly bear no responsibility for the analytical mistakes we may have made. Matt Shudtz and Suzann Langrall helped us compile the budget figures in chapter 3, charting the resources in constant dollars of the five agencies that are the focus of the book, and we appreciate their careful, meticulous work very much.

We thank our families—Daniel, Hannah, Jeremy, Joyce, and Sarah—who have given us their unconditional patience and love as we argued over arcane details on the phone and in person. And we want to give special thanks to our editor at the University of Chicago Press, David Pervin, who from the beginning understood why the book was important to us and how it could become important to others.

Contents

Preface vii

Acknowledgments xi

PART I. Diagnosis

CHAPTER 1. Public Interest Lost 3

CHAPTER 2. The People's Agents 38

CHAPTER 3. Hollow Government 54

CHAPTER 4. Cost-Benefit Analysis 72

PART 2. Institutions

CHAPTER 5. Congress 97

CHAPTER 6. The White House 122

CHAPTER 7. The Judiciary 146

PART 3. Solutions

CHAPTER 8. Positive Metrics 173

CHAPTER 9. Renewing the Civil Service 192

CHAPTER 10. The Road Forward 220

Notes 231

Index 261

PART I

Diagnosis

Public Interest Lost

Introduction

When Barack Obama ran for president as what former secretary of state Colin Powell described as a “transformational figure,”¹ he defined the role of government as helping people when they cannot help themselves:

Now, understand, I don't believe that government can or should try to solve all our problems. You don't believe that either. But I do believe that government should do that which we cannot do for ourselves—protect us from harm; provide a decent education for all children—invest in new roads and new bridges, in new science and technology. . . . Look, if we want [to] get through this crisis . . . we need to get beyond the old ideological debates and divides between the left and the right. We don't need bigger government or smaller government. We need better government. We need a more competent government. We need a government that upholds the values we hold in common as Americans.²

Without further elaboration, this fundamental principle—that government has a vital role to play in protecting people from harm—could lead to endless arguments in the arena of traditional social welfare programs over exactly when individual people cannot help themselves. But in the arena of protecting health, safety, and the environment, it is a serviceable, working proposition: when the threats are polluted urban air, dangerous drugs, and unsafe workplaces, individuals need government because control over the threat lies with someone else.

This book focuses on the five most important federal “protector agencies” created to shoulder these responsibilities—the Consumer Product

Safety Commission (CPSC), the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and the Occupational Safety and Health Administration (OSHA). Each agency was established on the premise that the national government must play the primary role in protecting citizens, workers, and natural resources from the negative by-products of industrialization. Congress decided, in partnership with a long line of presidents from both political parties, that the agencies are essential because individual people, acting alone, cannot take care of these problems.

The FDA is the oldest protector, with a birth date in 1906, during the presidency of Theodore Roosevelt, a period of emerging industrialization and caveat emptor mercantilism. At the time, the marketplace was awash in products like Swaim's Panacea, a deadly combination of sarsaparilla, oil of wintergreen, and corrosive sublimate (or medical mercury), which was sold to treat everything from ulcers to venereal disease. In a series of amendments to the original law, Congress extended the FDA's mission beyond policing such dangerous frauds to an affirmative responsibility for ensuring that all drugs and food are safe and that drugs are effective. Following in those footsteps, Congress created the other four protector agencies at the height of the social reform movement spawned by the Vietnam War and the Watergate scandal in the 1960s and 1970s. The problems they were designed to address were more subtle by then, and far more ubiquitous. This period of extraordinary legislative activism marked the largest expansion of federal power since the New Deal.

Despite their idealistic origins, forty-five years later, the five agencies are in shambles. In some instances, they have proved unable to deal with highly publicized threats—consider the FDA and Vioxx or lead paint-coated toys and the CPSC. In other instances, their reputations have been shaken by lower profile yet systemic failures—consider inaction on climate change at the EPA or the dearth of controls on workplace exposure to toxic chemicals at OSHA. “Shambles” is a harsh word, and we use it advisedly. In fact, the agencies fall along a continuum of dysfunction. Two—the CPSC and OSHA—would not make it past any reasonable triage of effective institutions, just managing to stay open for limited business. At the opposite end of the spectrum lies the EPA, the poster child for the deregulatory backlash that dominated national politics for twenty years. Regardless of the negative attention lavished on it by deregulators, the EPA has managed to cut a wider and deeper swath through public affairs

than the other agencies combined and has been brought to its knees only with considerable effort. In between, in less dramatic stages of disrepair, are the NHTSA and the FDA, which have clocked substantial achievements at the same time that emerging, important problems slip from their grasp.

Many of the agencies' problems are attributable to severe shortfalls in funding. They do not have nearly enough money to carry out their statutory mandates to keep air and water clean, prevent the sale of dangerous products, ensure food and drug safety, protect workers from injury and illness, and prevent traffic accidents. And yet, by any measure, the money we spend on them is extraordinarily modest, totaling about \$10.3 billion, or 0.29 percent of the \$3.5 trillion dollar budget Congress approved on April 2, 2009, and 0.89 percent of the \$1.2 trillion deficit projected for fiscal year (FY) 2010. The five agencies also suffer from gaps in legal authority that undercut their ability to take decisive action in the face of urgent threats. Their career staffs are depleted and demoralized, repeatedly denounced for regulating too much or too little. Yet as much as they suffer from this negative attention, they are damaged much more by a chronic lack of attention from the president and Congress, except during the public crises provoked by their regulatory failures.

This chapter introduces readers to the five agencies and their missions. They are presented by the size of their workforces, from smallest to largest. With that framework established, and a clear idea of what they were intended to accomplish, we describe the symptoms that indicate they are gravely disabled. We do not attempt to present a definitive diagnosis of everything that troubles them. Not only would such a discourse bore anyone not working directly within their ambit, it would divert our attention from their cross-cutting problems and possible reforms. Rather, our explanations are intended to give the reader an accurate snapshot of today's regulatory failures. We do our best to avoid the discredited practice of cherry picking isolated examples of agency disgrace, no matter how acute and well publicized. Instead, we choose one or two issues that pose important challenges to the agencies and are illustrative of their inability to fulfill their statutory missions overall. Subsequent chapters examine the multiple causes of their paralysis as a prelude to reforms that might rescue the agencies.

Of course, each agency has its own individual problems, caused by unique historical events, the tactics of the regulated industries, the competence of the public interest groups, and the attitudes of the political

appointees who lead them and the judges who sit in judgment on their decisions. Yet we hope to persuade readers that the commonality of their problems is far more meaningful. These themes, which we develop in the rest of the book, can and should be addressed holistically, renewing the rational justification for government intervention: protecting those who cannot help themselves.

Consumer Products

Thousands of Categories, Billions of Products

The CPSC was created during the presidency of Richard M. Nixon in 1972, following an exhaustive study by an ad hoc entity called the National Commission on Product Safety.³ The study estimated that as many as 20 million Americans were injured annually in their homes as a result of accidents involving consumer products, with 110,000 permanently disabled and 30,000 killed, at an annual estimated cost of \$5.5 billion. In its early years, the CPSC was identified as having the potential to be the most powerful regulator in the federal constellation. It never came close to realizing that potential.

The CPSC estimates that it has jurisdiction over some 15,000 product categories including everything from backyard barbecues and electric drills to swimming pool slides and baby dolls. Or, to look at this vast jurisdiction another way, the CPSC is responsible for ensuring the safety of every consumer product except automobiles, aircraft, boats, drugs, firearms, food, and tobacco. In its heyday, circa FY 1981, the CPSC employed 891 “full-time equivalents” (FTEs) and had a budget of \$41 million. Today, its resource levels are precipitously lower, coming in at approximately 420 FTEs and \$80 million for FY 2008, despite a growth of 40 percent in the country’s population. (Readers may notice that the budget figures we present vary by fiscal year. The government does not have a central Web site reflecting actual appropriations for all agencies and departments, leaving us dependent on individual agency Web sites that are updated erratically.)

The Consumer Product Safety Act assigns this sharply diminished workforce to “protect the public against unreasonable risks of injury” and to “assist consumers in evaluating the comparative safety” of products.⁴ The CPSC is supposed to identify specific “defects” in design or construction that make a product dangerous even when it is used for its intended

purpose with normal care. The statute authorizes the issuance of prospective, industry-wide standards for manufacturing safe products, but only if the manufacturers in question do not agree to develop their own “voluntary” standards that are adequate to reduce risks. As a practical matter, the CPSC staff routinely backs off issuing mandatory and enforceable standards if an industrial sector promises to come up with its own guidelines and to do its best to follow them. This approach means that only a handful of products—for example, fireworks, full-size cribs, and bike helmets—are actually covered by enforceable standards. Product-specific, after-sale “recall orders” have played a much larger role in the agency’s regulatory history.

Recall orders are only applicable to products that pose a “substantial product hazard” and are typically used to require manufacturers and retailers to take products off shelves and to persuade consumers to return the items to the store.⁵ To assist in the implementation of this authority, businesses must self-report instances for which they have information indicating that a product contains a defect that “could create” a substantial hazard. But because they depend heavily on free publicity and persuasion, recalls are notoriously ineffective. In FY 1997, the last year for which official figures are available, the CPSC estimated that the return rate on recalls was 16 percent.

To fulfill its missions of educating the public about hazardous products in the marketplace and highlighting areas in which enforcement action might be necessary, Congress instructed the CPSC to establish a National Electronic Injury Surveillance System. The system gets data from a representative sample of hospital emergency rooms regarding product-related injuries that come through their doors. The CPSC also gathers data from medical examiners and coroners about deaths that involve consumer products. All of this information could be used to project national injury trends and set priorities, especially in an era in which the World Wide Web makes data instantly accessible to individual consumers.

Congress anticipated that dissemination of this data could provide extraordinary disincentives to the manufacture and sale of defective products. But these businesses have worked hard to prevent such disclosures, arguing that because accidents are often caused by consumer negligence, the release of data would be deceptive, ruining the reputation of perfectly acceptable products at the same time that disclosure spotlights defects. They have clearly won this debate. Before the CPSC can release any information that identifies a specific manufacturer, it must submit