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Good morning. I’d like to thank the committee for inviting me to participate in this important hearing. Most of all, I’d like to thank you for holding this hearing. I’ve been working in the area of product safety for eight years, and for the first time, I am hopeful that we will move beyond talking about the challenges we face in children’s product safety, and finally act.

I’d like to start by making a few comments about how I got interested in this topic. I worked for most of my career in marketing, for Gillette and Talbots, as a consultant to Nabisco, M&M Mars, Ben & Jerry’s, and other companies, and as a marketing professor at Northwestern University. I have an M.B.A. from the University of Texas, and a Ph.D. in marketing from Northwestern. Yet, the first I ever heard of recalls was when my friends’ son Danny Keysar was killed by a recalled portable crib in 1998. Watching my friends bury their 16-month-old son, I vowed to learn how the child of two safety-vigilant University of Chicago professors could have been killed by a crib that had been recalled five years earlier. This is how I learned about CPSC.

I would like to spend what brief time I have today talking about what I believe are the two most insidious problems faced by CPSC: companies that flout the agency’s hazard self-report rule, and censorship. I’ll start with a story. It’s true, but I have changed the names of the victims.

One October night in 1998, Shannon Campbell was awakened at two a.m. by the screams of her children, 13-year-old Sara and 10-year-old Max. Shannon jumped out of bed, opened her bedroom door, and ran directly into a thick wall of black smoke. In a desperate attempt to flush the house with fresh air, she ran back into her bedroom and opened the second-story window. Then she jumped out of it. Unable to stand after breaking her leg in the fall, the 31-year old mother crawled on her hands and knees to a neighbor's house, banged on the front door, and when no one answered she kept going, crawling down a driveway into a cul-de-sac. She collapsed on her back and screamed until someone called the police.

By the time the fire department arrived, plumes of smoke were spewing from the house's blown-out windows. The firefighters crashed through the locked front door and made their way up to the children's bedrooms. There they found Max lying on his back in bed, entangled in the bedding. Sara was on the bed with her brother, curled into a fetal position. Both children were dead. A family dog lay at the foot of the bed, also dead.

Shannon's husband Jack was out of the country on a U.S. military mission. When he returned home his children were dead, his wife was in the hospital, and his home had been destroyed. A few days later, a Fire Department investigator told Jack that the fire had been caused by the family's three-year old big screen TV. Engineers working for the company that made the TV had discovered a design flaw – a flaw that created the potential for the sets to burn -- six months before Max and Sara were killed. But there was no way their parents could have known this.

The morning after the fire, the TV manufacturer's chief safety officer flew to Washington to meet with CPSC staff about a recall. The safety officer did not yet know

about the fire that had killed Sara and Max. What had prompted the trip was a call he had received from a North Carolina grandmother who had seen her TV go up in flames while she was babysitting for her granddaughter.

The grandmother's complaint had not been the first. Reports of burning televisions had been landing on the safety officer's desk for years. Dozens of similar sets had smoked, charred (the word the company preferred) or flamed. Sears, Allstate Insurance, Rent-A-Center and multiple homeowners had filed claims with the company. Two TVs had burned on retailers' showroom floors. Section 15(b) of the Consumer Product Safety Act required the safety officer to notify CPSC within 24-hours of learning of a product defect that posed a substantial hazard or created an unreasonable risk of injury or death.

The manufacturer agreed to recall the sets. But it did not agree to publicize the recall. Instead, the safety officer promised CPSC staff he would mail "safety notifications" to everyone who owned the TVs. It will come as no surprise that the safety notification did not reach all TV owners, and at least 45 more sets burned. In 2003, almost *five years* after Sara and Max were killed, CPSC recalled the sets for a second time. This time, CPSC and the manufacturer issued a recall press release. It read, "no injuries have been reported."

What does this story have to do with censorship? To me, it is a stark illustration of a simple truth: Censorship kills. Section 6(b) of the Consumer Product Safety Act prohibits CPSC from telling anyone – a *Consumer Reports* researcher, a daycare provider, a parent, or a journalist – anything about a product's safety record, unless the manufacturer gives the agency permission to do so. Just in case you missed that, I'll put

it in context and repeat it: CPSC is mandated to disseminate product-related safety information to the public, but the agency is not allowed to release information about a specific product or brand without first asking the manufacturer if it is okay to do so.

The company did not want the public to know its TVs were burning. Therefore, there was no way Shannon could have known her family's TV presented a hazard. What if she had been clairvoyant, if she'd suspected the TV was defective before hers burned, and called CPSC to find out if any other sets had caught fire? CPSC staff was not allowed to tell her a thing. But of course, it's not at all clear that the agency had anything to tell her. Why? Because the company's safety officer did not show up at CPSC to discuss the defective sets until after Max and Sara were dead.

In 2004 I got a grant from the Fund for Investigative Journalism to report on this story. I filed a Freedom of Information Act request with CPSC, asking for documents related to the recalled TV sets. What did I get back? Nothing. Request denied. And what happened when I called CPSC in 2006 and asked the public affairs officer why the recall press release stated, "no injuries have been reported" – a statement that denied Sara and Max had been killed? He told me to file a FOIA request for an answer. What happened when I did? Request denied. So was my appeal.

What does it say about how America, when we knowingly allow companies to flout CPSC's hazard self-report rule? What does it say about America when CPSC acts as an accomplice in corporate secret-keeping? What does it say about America when we allow children like Sara and Max, and my friends' son Danny, to die senseless deaths? It shows that we care more about the well-being of our corporations than we do about children's lives.

**The U. S. Consumer Product Safety
Commission:**

**The Paper Tiger
of American Product Safety**

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The U. S. Consumer Product Safety Commission: The Paper Tiger of American Product Safety

E. Marla Felcher, Ph.D.

Summary of Full Report

Whose job is it to ensure that portable cribs don't collapse and kill toddlers, that rotary lawnmowers don't make mincemeat out of feet, that power saws don't suddenly "kick back" and slash throats? Consumer activists spent the 1960s successfully convincing the American public that product safety was very much the responsibility of the U.S. government. Newspaper reports and widely read books such as Rachel Carson's *Silent Spring* and Ralph Nader's *Unsafe at Any Speed* revealed the personal and societal costs of letting markets operate unencumbered by federal oversight. In 1970, a bipartisan commission appointed by Congress reported that each year 20 million people were injured by products in their homes, 110,000 were permanently disabled, and 30,000 were killed, at a cost of \$5.5 billion per year to the federal government.¹ The combination of spotty, product-specific regulations (e.g., for refrigerators, flammable clothing, etc.) and case-by-case product liability litigation were not doing enough to protect consumers from the "unwanted consequences of the single-minded pursuit of the market system."²

In 1972, against the wishes of President Richard Nixon, Congress passed the Consumer Product Safety Act, creating the Consumer Product Safety Commission (CPSC). The new, independent federal agency was imbued with broad powers:

- ◆ to create mandatory safety standards for consumer products,
- ◆ to ban products that cannot be made safe by a standard,
- ◆ to collect and maintain a national database of product-related injuries and deaths,

¹ *The Report of the National Commission on Product Safety*, Government Printing Office, Washington, D.C., June 1970 (hereinafter referred to as NCPS Final Report).

- ◆ to recall hazardous products, and
- ◆ to impose civil penalties on companies that fail to self-report product defects.³

More than 15,000 product categories fell under the agency's jurisdiction, including household appliances, baby products, toys, home improvement implements and recreation equipment. Hailed as "the most powerful federal regulatory agency ever created," hopes were high as the commission opened its doors for business in 1973.⁴

CPSC has never lived up to these initial expectations. Shackled by the frustrating combination of a far-reaching mandate and the smallest budget of any federal health and safety agency, the commission has been exceptionally vulnerable to the politics of consumer product safety: the left's view that government is responsible for ensuring that the products we buy are safe, versus the right's position that the government has no authority to meddle in the nation's commerce. Over its short life, CPSC has been subjected to an unrelenting stream of criticism from Congress and nearly abolished by two presidents, Democrat Jimmy Carter and Republican Ronald Reagan. In 1985, at a particularly low point in the agency's history, CPSC commissioner Stuart Statler described how the commission was being treated by its adversaries, namely Congress and President Reagan's Office of Management and Budget (OMB): "[They] think we're kind of tasty morsels in their refrigerator. They keep opening the door for little nibbles, and before anyone notices we'll be gobbled up."⁵

When Ronald Reagan left office in 1988, CPSC staff exhaled an enormous sigh of relief. They shouldn't have. As it turned out, the agency's problems were chronic, not acute. Budget reductions ordered by Reagan's OMB director David Stockman and

² Reagan, Michael D., *Regulation: The Politics of Policy*, Little, Brown and Company, Boston, 1987, p. 9.

³ Adler, Robert S., "From Model Agency to Basket Case – Can the Consumer Product Safety Commission be Redeemed?" *Administrative Law Review*, 61, Winter 1989, p. 66. Also see Kimble, William, *Federal Consumer Product Safety Act*, West Publishing Company, St. Paul, 1975 for a description of each of the Act's statutes.

⁴ Schwartz, Teresa M., "The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade," *The George Washington Law Review*, 51:32, 1982, pp. 43-44.

Consumer Product Safety Act amendments passed by Congress in 1981 have proven to be immutable. Stripped to the bones by the Reagan administration and Congress in the 1980s, left to languish by Presidents Bush and Clinton, today CPSC is only a shadow of the robust agency Congress envisioned in 1972. The commission's mandate remains the same -- *to protect the public against the unreasonable risk of injury and death associated with consumer products* – yet the commission's backbone, its budget, and its statutory authority, have been eviscerated. As this occurred, many of the industries the CPSC oversees flourished. Manufacturers of CPSC-regulated products such as Fisher-Price Power Wheels, Cosco cribs, Whirlpool washing machines, Homelite chain saws, and Toro lawn mowers organized into formidable industry trade groups, whose job it is to fight CPSC regulatory initiatives that threaten the companies' well-being. American citizens, too, have contributed to this state of affairs, electing politicians who promise to reduce government.

Industry hasn't launched a single full-blown offensive to destroy the agency since the 1980's, simply because it doesn't have to. The Reagan administration's "regulatory reform" ensures, to this day, that any time there is a conflict between industry and the CPSC, industry will win. This imbalance goes far to explain why product-related injuries are 45 percent higher today than they were in 1970, when Congress recognized the need for a federal product safety agency.

⁵ Horwitz, Sari, "Consumer Agency Faces an Uncertain Future After Tumultuous Week," *Washington Post*, January 6, 1985, p. K1.

Prologue: How Danny Died

On the morning of May 12, 1998, Linda Ginzel left her 17-month-old son Danny at Sweet Tots daycare, just as she did most weekday mornings. When Linda said goodbye to Danny, he was laughing as his daycare provider, Anna, tickled him under the chin. The next time Linda and her husband Boaz saw their son, that afternoon, he was bundled in a receiving blanket by the emergency room nurses at Children's Memorial Hospital in Chicago.

This is how Danny died. Anna put him down for a nap, just as she did every afternoon, in a Playskool portable crib. When she checked on him a little later, Anna found that the crib had folded up with Danny in it, trapping the child's neck in the V-shaped wedge of its collapsed rails. Apparently, Danny had grabbed the crib's top rails and tried to stand. Though the toddler weighed only twenty-five pounds, the rails collapsed under his weight, snapping shut at the center hinge. Danny had been asphyxiated by his crib.

"It was a freak accident, a fluke," became Linda and Boaz's mantra immediately following Danny's death. "It could have happened to anyone," they said, blaming no one. As Princeton-trained social scientists, both Linda and Boaz well understood the concept of a low-probability random event – that an unlikely event can strike at any time and any place, and it is no one's fault. But in the weeks following Danny's funeral, as they began to piece together information about their son's death, the words "unforeseen" and "random" disappeared from Linda and Boaz's vocabulary. Danny was not the Playskool Travel-Lite's first victim, he was its fifth. Six weeks after Danny died, a New Jersey toddler became the sixth child to die in a Travel-Lite. Hasbro, the owner of the Playskool brand name, had known the Travel-Lite crib had killed several children. Kolcraft, the crib's manufacturer, knew this, too.

From 1993 to 1997, more than 1.5 million portable cribs with a similar design (center hinges on the top rails), marketed by Baby Trend, Draco (All Our Kids), Century Products and Evenflo, were recalled. In 1991, an 11-month-old Los Angeles toddler became the first baby known to have died in one of these cribs. Danny was the twelfth victim, and in 2001 a Washington toddler became victim fifteen. No one knows how many recalled cribs are still in use.

Every consumer product has a certain level of risk associated with it. Through carelessness or poor judgment, humans will figure out ways of being injured by such innocuous products as artificial plants and VCRs. But the issue is bigger than the random death of one or two children. Rather, the issue is how the U.S. regulatory system allowed more than a dozen toddlers to be killed by products their caregivers bought specifically to keep them safe.

In the Beginning: The Need and the Mandate

Throughout the 1950s, the U.S. government's response to dangerous products was tragedy-driven, product-specific, and sporadic.⁶ The Refrigerator Safety Act of 1956 and the Flammable Products Act, passed in 1953 in response to widely publicized stories of highly flammable sweaters and children's cowboy chaps, are representative of product safety legislation during this time. In the mid-1960s, the staff of the Senate Commerce Committee, headed by Chief Counsel Michael Pertschuk, decided the time was ripe to push for broad-based legislation that would cover a wide range of consumer products.⁷ Pertschuk and his colleagues successfully convinced the House, the Senate, and ultimately President Lyndon Johnson that his idea was worth looking into; in 1967, a joint resolution of Congress created the National Commission on Product Safety (NCPS).⁸ The seven-person bipartisan group's goal was to assess the incidence of product-related injuries and to suggest remedies to reduce them. The commission took its charge seriously; it held hearings throughout the country and developed an extensive body of evidence on product-related injuries. The NCPS issued its Final Report in 1970. The findings: Consumers were unnecessarily exposed to hazards associated with common household products like washing machines, hair dryers, toys, lawn mowers, power tools, and cribs. The proposed solution: A new, independent federal regulatory agency that would have the authority to set mandatory safety standards for consumer products and to recall dangerous products already on the market.

The NCPS Final Report prompted Congress to evaluate a number of bills, most involving the well-established Food and Drug Administration (FDA). The House considered expanding the FDA's authority and jurisdiction to include all household

⁶ *Government Accounting Office (GAO) Report HRD-87-47*, "Consumer Product Safety Commission Administrative Structure Could Benefit From Change," April 1987, p. 18.

⁷ Schwartz, Teresa M., "The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade," *The George Washington Law Review*, 51:32, 1982, pp. 35-36.

⁸ *The Report of the National Commission on Product Safety*, Government Printing Office, Washington, D.C., June 1970. (Hereinafter referred to as *NCPS Final Report*).

consumer goods, while the Senate considered subsuming the FDA into a new, omnibus consumer protection agency.⁹ Ultimately, a joint conference between the House and Senate passed a 1971 bill that left food, drugs, and cosmetics under the jurisdiction of the FDA and moved about 15,000 other household products under the jurisdiction of a new product safety agency. The Consumer Product Safety Act (CPSA) was passed in 1972, creating the Consumer Product Safety Commission, an independent federal regulatory agency that would report directly to the president.

Michael Pertschuk, the Senate staffer who had advanced the idea of a product safety commission (and who would eventually head up the Federal Trade Commission), believes timing played a significant role in the CPSA legislation getting as far as it did. The Act came on the heels of strict new automobile legislation, the result of Ralph Nader's public exposure of the unsavory practices of the automotive industry. "Even Republicans did not want to publicly go on record as being opposed to consumer regulation," Pertschuk said. "The auto industry had taken a beating, and they didn't think they'd get anywhere by opposing us."¹⁰ Unlike automotive regulation, which targeted a single industry, the CPSA affected thousands of products across hundreds of industries, diffusing industry opposition and making their organizational effort logistically more complex. "Business lobbyists were not yet strong," Pertschuk recalled. "The U.S. Chamber of Commerce had not yet gotten its act together, nor had the Business Roundtable."¹¹ Senator Charles H. Percy (R-IL), a CPSA supporter, counted Montgomery Ward, Motorola, and Zenith among proponents of the legislation. Edward S. Donnell, chairman of the board of Montgomery Ward said, "the creation of a new Consumer Protection Agency, as an advocate for consumer interests in government, will contribute

⁹ *GAO Report HRD-87-47*, p. 19.

¹⁰ Pertschuk, Michael, interview with author, January 21, 2002.

¹¹ The Business Roundtable, an organization of executives from the nation's leading corporations like Alcoa, GE and U. S. Steel, was created to ensure business played a role in public policy.

to consumer trust and ultimately to better economic results for business.”¹² The strongest debate in Congress over the Consumer Product Safety Act related not to whether the CPSC should exist, but rather to its relationship with the FDA – testament to the noncontroversial nature of consumer protection in the early 1970s.

The CPSC’s mandate was far-reaching with respect to both the number of products under its jurisdiction and the regulatory tools granted by Congress. The agency was given the authority to impose mandatory product safety standards, ban products that could not be made safe by a standard, recall hazardous products that were already on the market, and fine a company if it failed to report a product defect that had the potential to injure or kill consumers.¹³ The hodgepodge of existing federal product safety laws, including the Federal Hazardous Substances Act (1960), the Poison Prevention Packaging Act (1970), the Flammable Fabrics Act (1953), and the Refrigerator Safety Act (1956), were moved within the jurisdiction of the CPSC.¹⁴

The CPSC’s five commissioners were to be appointed by the president “with the advice and consent of the Senate,” each with seven-year staggered terms.¹⁵ The president would designate one of the five commissioners to be chairman.¹⁶ Of the five commissioners, no more than three were to be affiliated with the same political party. The agency was required to submit its budget requests to Congress and the president.¹⁷

During CPSC’s first set of Congressional hearings, the Senate pushed for an initial CPSC budget of \$180 million, which would increase to \$250 million in the agency’s fourth year. The House asked for considerably less: \$55 million in the first year, increasing to \$65

¹² Cohen, Richard, “Consumer Report/Protection Agency Bill Reaches Crucial Voting Stage,” *National Journal*, June 15, 1974, pp. 899-900.

¹³ Meier, Kenneth J., E. Thomas Gorman and Lael R. Keiser (eds), “Consumer Product Safety Regulation,” Mary Ellen R. Fise, in *Regulation and Consumer Protection: Politics, Bureaucracy & Economics*, Dame Publications, Inc., Houston, 1998, pp. 260-261.

¹⁴ The Fire Safe Cigarette Act, passed in 1990, is also within CPSC’s jurisdiction. (see Meier et. al.)

¹⁵ *GAO Report HRD-87-47*, p. 20

¹⁶ An amendment was added to this provision in 1978. Since this time, the chairman serves “at the pleasure of the President,” rather than for a full term. In most cases, the chairman has left the agency soon after a new administration takes office.

million by year four. The Nixon administration thought \$37 million would suffice. The CPSC opened its doors with a 1974 fiscal year budget of \$34.7 million and a staff of 786, making it the smallest health and safety agency in the nation. The magnitude of the size difference between the CPSC and other health and safety agencies is illustrated by 1977 budget and staff figures:

<u>AGENCY</u>	<u>1977 BUDGET</u>	<u>1977 # STAFF</u>
CPSC	\$39 million	900
FDA	\$276 million	7,500
OSHA	\$130 billion	2,700
EPA	\$1 billion	10,200 ¹⁸

Congress gave CPSC a tall mission, with few resources to carry it out.

¹⁷ *Regulation: Process and Politics*, Congressional Quarterly Inc., Washington, D.C., 1982, p. 52.

¹⁸ Schwartz, p. 44.

The Agency Grapples With Its Regulatory Tools

CPSC's first chairman, Richard Simpson, was faced with the daunting task of figuring out how to allocate the agency's budget in a way that would have the greatest impact on product-related injuries. The Consumer Product Safety Act granted Simpson two powerful tools: mandatory standards, which required a cumbersome rulemaking process that, once in place, would prevent manufacturers from launching dangerous products onto the market; and recalls, which were post hoc, but did not require rulemaking. Simpson chose the preventative, albeit most difficult route, mandatory standards; he boasted that he'd have new safety standards for one hundred products on the books within ten years. This promise came back to haunt him.

From the start, Congress intended for citizens to have broad rights within CPSC. One means of achieving this goal was to permit the public to petition the agency for a hearing or a product investigation that could ultimately lead to a new safety standard. "The public" included everyone – private citizens, public-interest groups, retailers, corporations, and industry trade groups. To drum up business, the newly hired, enthusiastic CPSC staff actively solicited petitions. In a classic case of "be careful of what you wish for," over two hundred petitions were docketed within the agency's first three years.¹⁹ Deluged, the regulators soon were simply reacting *to* petitions, rather than setting their own priorities and trying to eradicate the nation's most significant product hazards. In 1973, the commission unveiled the Consumer Product Hazard Index (CPHI), a system that ranked products according to their level of risk. Regulators intended to use the CPHI to set priorities; safety standards would be written for the products highest on the list. But once staff entered the vicious cycle of responding to every outside petition that came its way, the CPHI never had a chance. In 1973, CPSC Chairman Richard Simpson had said he'd be "happy" if 70-75% of the agency's resources were allocated

¹⁹ Schwartz, p. 47.

to product hazards on the list.²⁰ In 1976 Simpson admitted defeat, recognizing that at least 75 percent of his agency's activities had been "reactive as opposed to planned."²¹

Swimming Pool Slides

Five years after Chairman Simpson took office, the agency had issued standards for only three products: swimming pool slides, architectural glass (used in homes), and matchbook covers. Of the three, architectural glass was the only product rated by the agency as posing a significant product hazard, appearing in slot ten on the agency's "10 most wanted" list.²² Another, the swimming pool slide standard, had been initiated by manufacturers, who had quickly figured out how to use the agency's open rulemaking process to their advantage. The National Swimming Pool Institute, an industry trade group, and Aqua Slide, a company that sold 95 percent of all swimming pool slides in the U. S., filed the petition jointly. Both parties readily admitted that a CPSC-initiated safety standard would benefit them economically. Before the CPSC was created, the slides were regulated by the FDA, which had threatened to ban the product altogether. A mandatory standard, promulgated by the CPSC, would ward off a future product ban.²³

In fact, swimming pool slides posed a small risk, and did not even show up on the CPSC's product hazard ranking index. The commission knew of fourteen injuries resulting from the slides, some occurring as a result of odd behavior; one victim, who had been drinking, hit a chair that was floating in the pool, and another went down the slide on his knees. But because the injuries that did occur were so serious (neck and spinal cord injuries), Aqua Slide and the trade group convinced the CPSC commissioners to write a standard.

²⁰ Gardner, Judy, "Consumer Report/New Safety Agency Ranks Product Risks as Guide for Proposed Regulatory Action," *National Journal*, October 6, 1973, p. 1489.

²¹ Schwartz, p. 50.

²² Kelman, Steven, "Regulation by the Numbers – a Report on the Consumer Product Safety Commission," *The Public Interest*, 1974, p. 101.

²³ Schwartz, p. 50.

As one of only three standards promulgated by the new agency, the slide standard took on the appearance of an agency priority. The standard was an early, very public test of the CPSC's ability to regulate product safety. Assailed from all sides, the commissioners, the agency and the standard failed miserably. Consumer advocates argued that a public agency had no business advancing the pecuniary interests of industry. CPSC had scarce resources, and surely there were more pressing safety hazards to keep the regulators busy. Free market enthusiasts complained that the agency had taken a year and a half to write a standard that read like a parody of an overly cautious parent. "Look out for people and objects below," one mandated warning label stated, while another, to be affixed on slide ladders, instructed, "Correct belly slide: head up, arms straight ahead, fingers pointing up."²⁴ It seemed as if the only people who believed the standard would improve pool slide safety were the commissioners who helped draft it.

An Alternative: Voluntary Standards

Industry presented an alternative to CPSC's problematic rulemaking process: voluntary standards. Voluntary standards differed from mandatory standards in two important respects. First, manufacturers could choose to comply with a voluntary standard, or not. Second, industry would reign over the nitty-gritty technical work of setting the standard, such as which hazards would be addressed, how performance would be measured, and ultimately, what it would mean for a product to be "safe enough." As originally enacted, the Consumer Product Safety Act did not contain language addressing voluntary standards, although the National Commission of Product Safety's 1970 Final Report had painted a bleak picture of this method of "self-regulation":

Industry activities to develop safety standards can provide an important forum for marshaling the technical competence necessary for this work, but their voluntary nature inherently inhibits the development of optimal standards. The consensus principle, which is at the heart of all voluntary standards making, is not effective

²⁴ Kirkland, Richard I., "Hazardous Times for Product Safety Czars," *Fortune*, June 15, 1981, p. 127.

for elevating safety standards. It permits the least responsible segment of an industry to retard progress in reducing hazards.²⁵

Today, critics of voluntary standards levy the same complaint: the voluntary standard-setting process is dominated by manufacturers, who must make precarious tradeoffs between safety, product performance, and corporate profits. "There are many voluntary standards that have done a lot of good," said Consumers Union technical director David Pittle, who served as a CPSC commissioner from 1973 to 1982. "But those were from industries willing to improve their products. The sad reality is that you can look at injury and death patterns and see that many problems (are not) getting fixed voluntarily."²⁶ Chain saws, one of the CPSC's early experiences with voluntary standards, are a case in point.

In 1977, Arkansas attorney John Purtle petitioned the agency to develop a safety standard for chain saws, citing the case of a man who suffered severe disfigurement when he was slashed in the face by his saw.²⁷ During the 1970s the market for electric and gasoline-powered chain saws exploded in the U.S., as the price of fuel rose and consumers sought alternative energy sources, such as fireplaces and wood-burning stoves, that required cut wood. In 1970 there were 2.3 million chain saws in use, and by 1977 there were over 3 million. As chain saw sales increased, so did injuries. In 1977, about 77,000 consumers were treated in hospital emergency rooms for chain saw-related incidents; the number was expected to reach 100,000 by 1979. About a quarter of the injuries associated with chain saws were caused by a phenomenon known as "kickback," a sudden, violent upward or rearward movement of the saw that caused the operator to be struck by the moving chain, frequently in the neck, face, or throat. Most kickback incidents were caused when the chain hit an obstruction or unusually

²⁵ *NCPS Final Report*, p. 2.

²⁶ Pittle, David, interview with author, December 4, 2001.

²⁷ See "Chain Saws (A), (B) and (C)," *Harvard Business School Cases #9-382-086, 087, 088*, for complete discussion of chain saw standard promulgation.

hard portion of the wood. Purtle asked the CPSC to promulgate a mandatory standard that would reduce or eliminate chain saw kickback.

In November 1977, seven months after Purtle filed the chain saw petition, a newly formed industry trade group, the Chain Saw Manufacturers Association (CMSA), jumped into the fray. Arguing that inexperienced users were to blame for most chain saw injuries rather than poorly designed products, the group respectfully asked the CPSC to butt out of its business, and offered to write a voluntary safety standard itself. Regulators considered chain saw kickback a hazard too severe to be addressed by a voluntary standard, and turned down CSMA's offer. Refusing to take no for an answer, CSMA president Donald Purcell wrote to the commission proposing to create a high-quality, industry-initiated voluntary standard within eighteen months – a significantly shorter time than CPSC could write a mandatory standard.

Purcell's letter could not have landed at the agency at a more opportune time. Concerned that the CPSC was squandering its resources, Congress had ordered the Government Accounting Office (GAO) to investigate the agency's operations. By the end of 1977, around the time Purcell's letter arrived, the GAO had issued three reports criticizing the CPSC's snail-like standard-setting process, its inefficient use of resources, and its tendency to "fumble over arranging its priorities."²⁸ The agency sorely needed a new course of action. To CPSC Chairman John Byington, a Republican whom President Ford had chosen to replace Chairman Simpson in 1976, voluntary standards were an attractive option, and he liked the chain saw trade group's proposal. Abandoning the chain saw mandatory standard required a commission vote; Byington needed to convince at least two of his fellow commissioners to give Purcell's voluntary standard a chance.

²⁸ *Regulation, Process and Politics*, p. 52.

Byington didn't have much time to lobby his colleagues; President Jimmy Carter filled two open commission spots shortly before the vote. Democrats Susan King and Edith Barker Sloan were both appointed in March 1978, and the chain saw vote was scheduled for the end of the month. Byington quickly got to work campaigning his new colleagues. On March 30, the commissioners voted 3-1 to stop work on the mandatory chain saw standard and to allow the industry to write its own voluntary standard.²⁹

Commissioner David Pittle was the lone dissenter. In a blistering opinion, Pittle laid out his objections to a voluntary chain saw standard: Not only was the risk associated with chain saws too severe for the CPSC to defer to the industry's own solutions, but the CSMA, as a newly formed organization, had no experience writing standards. "(T)o defer for eighteen months a Commission decision to develop a mandatory standard for chain saws in order to permit an industry group to develop a voluntary standard," Pittle wrote in his dissenting opinion, "sets a dangerous precedent for future CPSC standards setting."³⁰

In June 1978, the CPSC signed a negotiated agreement with the CSMA to begin writing a voluntary safety standard that would specifically deal with chain saw kickback. The CPSC committed \$500,000 and staff time to support the industry-generated work plan.

The first hint of trouble came six months into the process, when the CPSC project director reported that industry participants had been slowing down the project. Two manufacturers had developed different kickback testing devices, and they were bickering between themselves over which device would become part of the standard. When the eighteen-month deadline arrived at the end of 1979, the industry had little to offer. By January 1980, CSMA president Purcell was embroiled in a full-blown conflict with the chairman of the CSMA board, G. T. Rush (vice president of the McCullough

²⁹ Pittle, David, "Petition of John Purtle for the Promulgation of a Consumer Product Safety Standard to Reduce Chain Saw Kickback," *Dissenting Opinion of Commissioner R. David Pittle*, Consumer Product Safety Commission, CP-77-10.

³⁰ *Ibid*, p. 4.

Corporation, the nation's third largest chain saw manufacturer). CSMA had hastily drafted a standard after the eighteen-month deadline had passed, and Rush encouraged CPSC not to accept it, claiming the standard did not go far enough to reduce the kickback hazard. CPSC staff agreed. On September 18, 1980, two years and hundreds of thousands of CPSC dollars after industry convinced the commission to back off of a mandatory standard, the agency published a *Federal Register* notice announcing its intent to move forward with a mandatory chain saw standard. While manufacturers had been dragging their feet, chain saw-related injuries rose to over 120,000 in 1980, an increase of more than fifty percent in just three years. Commissioner David Pittle had been right.

Chairman King Refocuses Agency Priorities

Soon after he convinced his new colleagues to abandon the mandatory chain saw standard, Chairman Byington resigned from the CPSC.³¹ The Republican had done little to convince Congress, the president, and the public that CPSC was an effective agency, worthy of public funding. Byington had set few mandatory standards, and he'd overseen the squandering of an enormous amount of staff time and energy on the chain saw standard, with little to show for the effort. Far from the powerful safety watchdog Congress had envisioned, the CPSC was limping along like a confused puppy.

Congress started asking the remaining commissioners tough questions, while consumer groups whispered among themselves that perhaps the commission was a case of good intentions gone awry. When the agency came up for reauthorization in 1978, the cards were stacked against it. President Jimmy Carter, looking for a way to prove that Democrats could be just as tough as Republicans on inefficient government agencies, strongly considered the recommendation of his advisers to abolish the agency altogether. Esther Peterson, Carter's special assistant for consumer affairs, is credited

³¹ Kramer, Larry, "King Becomes First Democrat to Head CPSC," *Washington Post*, June 30, 1978, p. F3.

with convincing the president to give the agency one more chance.³² Byington, too, played a role in the reauthorization; his resignation helped convince Congress and President Carter that the agency now had a fighting chance to improve.

In July 1978, President Carter appointed Susan King to replace Byington. The first Democrat to head up the commission, King was charged with bringing structure and order to the chaotic agency. King's number one priority was to establish the CPSC as a political entity in the eyes of Congress. Having worked on the Hill for years, most recently as Federal Election Commission official, King understood that Congress held the agency's purse strings, and that if they didn't like what she was up to, they'd cut her budget. Her first order of business was to meet with members of the agency's congressional oversight committees. "All the committees had Democratic chairmen and I knew them," King said, recalling her early days at the commission. "I had worked with them, I had worked for organizations that had made campaign donations to progressive Democrats. They knew I had good political sense, I had a political history, and I was trusted."³³ King also understood that while her reputation could get the ear of Congress, she needed something more to hold it. Revitalizing the agency would require the strong support of her staff – the commission's scientists, engineers and lawyers, many who had been at the agency from the start.

Congress wanted results, and it was King's job to figure out how to deliver them. She weighed her options. On the one hand, she could continue along the course that Simpson and Byington had taken, slogging along at a rate of two to three mandatory safety standards a year, negotiating back and forth with entire industries. Or she could reshuffle the agency's resources to allow her to participate in dozens of voluntary standards and rack up hundreds of product recalls each year. Recalls affected one company at a time, typically did not require a commission vote, and could move along

³² Fise, in Meier et. al., p. 263.

³³ Susan King, interview with author, January 28, 2002.

at a faster pace. "I would suggest that there are many, many other things [besides mandatory standards] that Congress, the White House, the public and the press should look at in evaluating the CSPC in the next two to three years," King said in her first press conference, "(such as) bans, recalls, imminent hazard warnings, and actions where the commission moves against specific product hazards already in the marketplace."³⁴ The new chairman was clear about the direction she intended to steer her agency.

King stepped up the agency's participation in voluntary standards to about two dozen a year. Recalls, previously hovering below 150 a year, soared to 588 in 1979, King's first full year in office.³⁵ For the first time in its short history, a CPSC chairman had figured out how to win the respect of her Congressional funders: deliver compelling data that told the story of an agency's upward trajectory. "(T)he people who worked with me, General Counsel Andy Krulwich, Linda Billings Kiser in Congressional Relations, and others, get credit for addressing, very successfully, our major objective," recalled King, "reestablishing the credibility of the agency on the Hill, and in the press and public, after several bad starts ..."

King had taken control of her agency, but she had little control over events brewing within the larger political arena. By the time she took the helm at the CPSC, industry was no longer somnolent. As inflation and interest rates hit all-time highs at the end of the 1970s, industry blamed the country's economic slump on excessive regulation. They were unfairly burdened by the costs of compliance, manufacturers claimed, and launched a campaign to regain control. Corporations flocked to Washington, setting up public affairs offices and engaging law firms and lobbyists to represent their interests in court and Congress and to the American people. Speaking with one voice, the message they delivered was simple and clear: The cost of regulation far outweighed its benefits. The era of "leftist liberal politics" had come to an end.

³⁴ Kramer, Larry, "Dealing with the Most Serious Problems," *Washington Post*, August 10, 1978, p. D1.

The Reagan Years: Industry Takes a Front-Row Seat

When President Reagan moved into the White House in 1980 with promises of regulatory overhaul, Susan King resigned. “I didn’t want to have to fight for CPSC’s existence everyday,” King explained, “where if they didn’t believe in what you did, you’d lose, and they’d go after your budget. Also,” she added, “they won the election, so they were entitled to their own people.”³⁶ President Reagan’s people couldn’t have been more different than Jimmy Carter’s. Soon after settling in as President Reagan’s Office of Management and Budget (OMB) director, David Stockman announced his preference for the agency: Abolish it. As it turned out, Stockman’s friends in industry and in Congress were eager to help carry out his plan.

Mandatory Standards Under Siege

The commission’s 1981 Senate reauthorization hearing, scheduled for the first four days of April, was the ideal forum for CPSC’s foes to kick-start their agenda. Limiting the CPSC’s ability to promulgate mandatory safety standards was at the top of their to-do list. Senator Bob Packwood (R-OR) headed the CPSC’s Senate oversight committee, Commerce, Science and Transportation; Senator Bob Kasten (R-WI) led the Consumer subcommittee.

Representatives of industry lined up to recount to an audience of simpatico senators the many ways CPSC had thwarted the nation’s business. The aggrieved parties included the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Electrical Manufacturers Association, the Outdoor Power Equipment Institute, the Toro Company, the Association of Home Appliance Manufacturers, the Formaldehyde Institute, the Chemical Specialties Manufacturers Association, the Toy Manufacturers of America, 3M, and the Chain Saw Manufacturers Association. Speaking

³⁵ “CPSC Product Recall Summary,” fax sent to author by Ken Giles, CPSC Office of Public Affairs, September 29, 2001.

³⁶ Susan King interview.

on behalf of the U.S. Chamber of Commerce, corporate defense attorney Aaron Locker lamented, "CPSC's failures are legion and need not be dwelled upon."³⁷ He then recited a laundry list of such failures, paying particular attention to the swimming pool slide standard. Locker's solution: "(T)he CPSA should be amended to prevent CPSC from promulgating a consumer product safety standard if an acceptable voluntary standard exists ..."³⁸

Bernard Falk, president of the National Electrical Manufacturers Association, also minced no words in expressing his attitude toward CPSC's rulemaking efforts: "... eight years after its creation, the Commission is a failure in the standards area ... perceived as industry's antagonist."³⁹ Chain Saw Manufactures Association President Donald Purcell, no stranger to the commission, agreed with his fellow businessmen. "CSMA does not believe the Commission should have – or that it needs – the authority to impose industry-wide mandatory standards on this country's manufacturers and consumers," Purcell testified. "(T)he thrust of the Commission's efforts should be directed at furthering and promoting voluntary standards ..."⁴⁰ At the time Purcell uttered these words, CPSC was at work on a mandatory chain saw standard, after having rejected Purcell's proposed voluntary standard the previous year for being too lax.

Industry objections to the CPSC's onerous safety standards fell on receptive ears in the Republican-dominated Senate. In August 1981, Congress amended the Consumer Product Safety Act to prohibit the agency from promulgating a mandatory safety standard if compliance with a voluntary standard "would eliminate or adequately reduce the risk of injury and it is likely there will be substantial compliance with the

³⁷ *Consumer Product Safety Commission Hearings Before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation*, U. S. Senate, 97th Congress, Serial No. 97-35, U.S. Government Printing Office, Washington, D.C., April 1, 2, 3, and 7, 1981, p. 12

³⁸ *Ibid*, p. 16

³⁹ *Ibid*, p. 90

⁴⁰ *Ibid*, p. 51

voluntary standard.”⁴¹ Industry, now in control of the standard-setting process, could not have been more pleased. The 1981 voluntary standard amendment taught CPSC regulators an important lesson: threatened with far-reaching regulation, corporations would organize and fight back. And as long as Republicans controlled the White House and Congress, corporate interests would prevail.

The 1981 CPSA Amendment, Twenty Years Later

Of the thousands of products the CPSC oversees today, only a handful must comply with a mandatory safety standard, among them cigarette lighters, fireworks, full-size cribs, and bunk beds. Dozens more, such as gas furnaces, gas grills, smoke detectors, hair dryers, microwave ovens, lawnmowers, baby walkers, high chairs and strollers, are covered by voluntary standards. Still other products under CPSC’s jurisdiction, including products intended for children -- infant carriers, baby swings, cradles, bassinets -- are not even covered by a voluntary standard.

Since the 1990s, CPSC has passed, on average, less than two mandatory standards a year, primarily for children’s products such as bike helmets and bunk beds, child-resistant packaging, and childproof multi-purpose cigarette lighters.⁴² CPSC engineers and technical staff work on approximately sixty voluntary standards a year. Mary Ellen Fise, former general counsel of the Consumer Federation of America, one of the nation’s largest consumer advocacy groups, maintains that CPSC’s ability to *propose* mandatory standards is one of the agency’s greatest sources of power; whether or not the commissioners vote *to adopt* a mandatory standard becomes a secondary level of inquiry for the agency⁴³. CPSC’s rulemaking on baby walkers, the product that throughout the 1980s and early 1990s sent more children to hospital emergency rooms than any other baby product, worked in this way.

⁴¹ Adler, Robert S., “From Model Agency to Basket Case – Can the CPSC be Redeemed?” *Administrative Law Review*, 61, Winter 1989, p. 98.

⁴² *CPSC Annual Reports, 1990-2001*, www.cpsc.gov.

⁴³ Fise, Mary Ellen, interview with author, December 2, 2001.

Even after the baby products industry put a voluntary walker standard in place in 1989, injuries continued to rise, reaching 29,000 in 1991.⁴⁴ In 1992, Fise, along with the American Academy of Pediatrics, the National Safe Kids Campaign, and Consumers Union, petitioned CPSC to ban the product completely. "It's just terrible, year in and year out, to have these babies admitted to our emergency room because they have crashed down stairs and sustained serious brain injury or have scalded themselves while in their walkers," said Dr. Abe Bergman, director of pediatrics at Harborview Medical Center in Seattle, in support of the petition. "Don't buy walkers," Dr. Bergman directed parents, "and if you have one, throw it away."⁴⁵ The CPSC commissioners, all appointed by President George H.W. Bush, voted unanimously to deny the petition, stating simply that the product's record did not support a ban.⁴⁶

By 1994, over 20,000 children still were being rushed to hospital emergency rooms each year for walker-related injuries. CPSC again took up the issue of walkers with the urging and support of Fise and her colleagues. This time, the consumer advocates met with more success; the commissioners voted 2-1 to begin the rulemaking process for a mandatory standard.⁴⁷ The industry's clock started ticking with the commission's rulemaking vote. "The CPSC (was) telling industry, here is your chance to come up with a standard on your own," explained Fise, "or we will do it for you."⁴⁸ CPSC Chairman Ann Brown, a Democrat appointed by President Clinton, promised manufacturers she would terminate the rulemaking process if the industry developed a more stringent voluntary standard on their own.

Fise's petition and the CPSC vote were the push the industry needed to write an effective voluntary standard. In 1997, manufacturers unveiled an updated standard that

⁴⁴ *Consumer Federation of America press release*, "Ban of Baby Walkers Requested by Consumer Groups and Pediatricians," August 27, 1992.

⁴⁵ *Ibid.*

⁴⁶ *CPSC press release # 93-063*, April 15, 1993.

⁴⁷ *CPSC press release #94-102*, June 30, 1994.

⁴⁸ Fise interview.

required walkers to come equipped with at least one feature that prevented them from tumbling down stairs.⁴⁹ Some walkers now have brakes that automatically engage if a child starts to fall over an edge. Others are designed to be too big to fit through a standard door opening. Equally important, the media attention surrounding Fise's petition alerted parents to the dangers of walkers. Sales plunged, just the incentive manufacturers needed to come up with a replacement product – stationary entertainers. Unlike walkers, the new entertainers did not allow a baby to be mobile, eliminating most of the risk. By 2000, walker injuries had decreased by seventy percent from 1992 levels.⁵⁰ The *threat* of a mandatory standard (along with media attention) had worked. Today, fewer parents buy walkers, and those who do can choose to buy brands that comply with the safer voluntary standard.

Fise describes CPSC's judicious use of mandatory-standard rulemaking as the "carrot and stick" approach. According to this strategy, the CPSC offers manufacturers the carrot of writing their own voluntary standard; if they come up with a standard the commission doesn't like, the agency pulls out the rulemaking stick. However, for the stick to be effective, industry must genuinely believe that the CPSC commissioners will follow through and promulgate a final rule. Industry knew that Chairman Ann Brown was serious about moving forward with a mandatory walker standard. Manufacturers had less incentive to write stringent voluntary standards before her tenure, when Bush-appointed commissioners were running the show. For this reason, the President wields enormous power over the agency through his appointment of CPSC commissioners, who decide if and when to rattle their sticks.

The Reagan Appointments Get to Work

Congress had dealt a debilitating blow to the CPSC with the 1981 voluntary standard amendment. By the mid-1980s when the Carter-appointed commissioners'

⁴⁹ Jones, Sandy, *Consumer Reports Guide to Baby Products*, Consumer Reports Special Publications, Yonkers, NY, 1999, p. 230.

terms began to expire, it was time for the Reagan White House to have its way with the agency. Appointing Terrence Scanlon to the commission in 1983, President Reagan sent an unambiguous message to the CPSC: get off of industry's back. Plucked by the White House from the industry-promoting Commerce Department, Scanlon was a social conservative, active in the right-to-life movement. And, as luck would have it, he was a registered Democrat, which freed up a commission spot for another Republican.⁵¹

From the start, tension ran high between Scanlon and the agency's other commissioners, particularly the Reagan-appointed Republican chairman, Nancy Stoerts. Scanlon and Stoerts served together for less than an year; after a series of public scandals ranging from Stoerts's use of agency funds to decorate her office, to allegations that she grossly mistreated her staff, President Reagan asked Stoerts to resign.⁵² The president promoted Scanlon to the CPSC chairmanship the very day Stoerts stepped down, January 5, 1985. Because Congress was on recess, the White House was able to bypass Senate confirmation hearings – a process that, given Scanlon's track record as an enthusiastic deregulator, was guaranteed to be protracted and messy.⁵³ Scanlon was permitted to serve as chairman for up to one year without Senate confirmation. Promoting Scanlon to the CPSC chairmanship moved the White House a giant step closer to realizing David Stockman's death wish for the agency.

By the beginning of 1985, all of Jimmy Carter's commissioners except moderate Republican Stuart Statler had left the agency. Statler's remaining colleagues were Reagan appointments: Terrence Scanlon, conservative Democrat Sandra Armstrong, and Republican Carol Dawson, who had served on the staff of the American

⁵⁰ *CPSC Product Summary Report*, NEISS System estimate, 2000.

⁵¹ Sinclair, Molly, "New Face From Commerce," *Washington Post*, January 27, 1983, p. A21. The commission had been operating with four members since commissioner David Pittle's term had expired in October 1982. The Consumer Product Safety Act specified that no more than three commissioners could be from the same party, which made a conservative Democrat extremely attractive to President Reagan.

⁵² Mayer, Caroline E., "CPSC Chairman Perks Along," *Washington Post*, October 8, 1981, p. D11, and Mayer, Caroline E., "CPSC Director Quits, Slams Chairman," *Washington Post*, October 23, 1981, p.D9.

⁵³ Horwitz, Sari, "Sneaking One Past the Senate," *Washington Post*, January 6, 1985, p. K6.

Conservative Union. The fifth slot remained open. The chasm widened between CPSC's career staff, who were generally dedicated to carrying out the agency's mission, and the Reagan-appointed commissioners, who were increasingly seen as thwarting it.

As CPSC chairman, Scanlon did more to undermine consumer product safety than any chairman in the agency's history, a dubious achievement that holds true to this day. Scanlon's loyalty to industry and his disdain for government intervention in commerce, regardless of the body count, played out in his battle with Commissioner Stuart Statler over the regulation of All-Terrain Vehicles (ATVs).

About two years after President Reagan took office, CPSC staff were becoming concerned about the surge in injuries and deaths associated with ATVs, motorized vehicles with three or four large, soft tires designed for off-road recreational use. As ATVs infiltrated the American marketplace in the early 1980s, ATV-related accidents skyrocketed from 29 deaths and 10,000 injuries in 1982 to 156 deaths and 78,000 injuries in 1984.⁵⁴ Of greatest concern was that children under 16 years old made up half of those injuries and deaths.

CPSC staff found an ally in Commissioner Statler, who called for an outright ban on the sale of three-wheeled ATVs and a recall of three-wheelers already on the market.⁵⁵ The other commissioners voted to initiate the rulemaking process, but with an extensive list of caveats that essentially stymied any effective action for another eighteen months. Before the commission would begin work on a product recall, mandatory standard, or ban, regulators would hold a series of nationwide hearings to solicit industry and user input, and the ATV industry would be given the opportunity to write its own voluntary standard. The plan did little more than buy the industry time to pump hundreds of thousands of unregulated ATVs onto the market. ATV-related deaths

⁵⁴ See CPSC internal memo from Jo-Annette David, Division of Hazard Analysis to Susan Ahmed, Ph.D., Associate Executive Director, "Annual Report of ATV Deaths and Injuries," May 14, 2001 for detailed discussion of ATV-related injuries and deaths, 1982 through 2000.

⁵⁵ *CPSC press release #85-015*, April 4, 1985.

continued to rise, reaching 251 in 1985; about one person a day was killed during peak riding seasons.

Meanwhile, pushed by Commissioner Statler to take action against the industry, Scanlon refused to budge. Equally frustrated with Scanlon's leadership, CPSC staff complained to outsiders about what was going on inside agency walls. Joan Claybrook, president of the non-profit consumer advocacy group Public Citizen, was a sympathetic listener. Disturbed by what she was hearing, Claybrook conveyed to the CPSC's Senate oversight committee the most serious of the staff's concerns: an allegation that Scanlon had met with manufacturers of ATVs in a private, closed-door meeting, contrary to agency procedures, during the time the commission was considering regulatory action against them.⁵⁶ In October 1985, the Senate Commerce Committee ordered the Government Accounting Office (GAO) to investigate Scanlon's alleged improprieties.⁵⁷ The GAO was asked to work quickly, because Scanlon had yet to be confirmed as full-time chairman by the Senate and his recess appointment would expire within a few months.

The GAO was unable to substantiate the allegations against Scanlon. One of the CPSC employees who allegedly had knowledge of these activities refused to be interviewed for fear of being fired; the GAO could not guarantee that she would not be.⁵⁸ A week after the report's release, in December 1985, the Senate narrowly confirmed Scanlon as CPSC chairman.⁵⁹

While the GAO was investigating Scanlon, Representative Larry Craig (R-ID), ranking minority member of the House commerce subcommittee and an ATV industry-

⁵⁶ Horwitz, Sari, "Claybrook Renews Attack on CPSC Head," *Washington Post*, October 5, 1985, p. B9.

⁵⁷ Horwitz, Sari, "GAO Probe of Scanlon is Planned," *Washington Post*, October 18, 1985, p. E2.

⁵⁸ *GAO Report HRD-86-41BR*, "Consumer Product Safety Commission Allegations About the Chairman," November, 1985.

⁵⁹ Scanlon was approved 9-7 by the Senate Commerce Committee. Senator Robert Packwood (R-OR) voted against Scanlon's confirmation because he felt Scanlon had not truthfully answered some of the same questions during his confirmation hearings that he had been asked by GAO investigators, see *Washington Post*, "Panel Backs Scanlon as CPSC Chief, 9 to 7," December 13, 1985, p. A19.

supporter, sought ways to protect the industry. In November 1985, Craig called for the Justice Department to investigate whether Statler had breached federal law by issuing a CPSC Fact Sheet on ATV-related injuries and deaths culled from the CPSC's database. "I'm astonished that Congressman Craig would be so careless and misdirected in his charges," responded Statler, concerned about improper Congressional interference in a regulatory enforcement matter. "What really needs to be investigated is why this congressman is so hell-bent to deprive the American public of critical information about one of the most dramatic surges of injuries ever to be associated with a product under CPSC's authority."⁶⁰ Congressman Craig (R-ID) failed to muster support for his investigation and the Justice Department turned him down.

Profoundly disturbed by the commission's refusal to carry out the agency's mandate, and with his seven-year term about to expire, Statler prepared to leave the CPSC in the spring of 1986. In May, he made a last-ditch effort to rid the market of ATVs, asking Congress to legislate a remedy. In a letter to John Danforth (R-MO), head of the Senate Commerce committee, and John Dingell (D-MI), head of the House Commerce Committee, Statler summarized the gruesome situation: During the brief four years ATVs had been on the market, more than 185,000 Americans had been injured and another 415 killed. "No one can possibly feel comfortable with these numbers," Statler wrote. "Frankly, I've not seen anything like it for any product hazard in my seven years serving as Commissioner of this agency."⁶¹ Statler recommended three actions: A ban of three-wheel ATVs in production, a recall of the 1.6 million three-wheel ATVs currently in use, and a comprehensive public notification of the hazards associated with the product.

If Statler got his wish, CPSC would oversee the largest recall in its history. There was no apparent fix for the problem; manufacturers would be required to take the units back – and refund consumers' money. CPSC and industry estimates ran as high as \$3

⁶⁰ Horwitz, Sari, "Probe of CPSC's Statler Urged," *Washington Post*, November 8, 1985, D9.

billion for the recall, about \$2 billion to be incurred by market leader Honda. ATV manufacturers clearly had much at stake.⁶²

Statler's letters were a wake-up call for the CPSC's oversight committees. Within three months, the House committee – which had been carrying on a parallel investigation to that of the CPSC for more than a year -- proposed that three-wheel ATVs be identified as an imminent hazard and all units recalled. Six months later, in December 1986, the CPSC commissioners ruled that both three- and four-wheel ATVs presented an imminent hazard. The remedy: A refund program for all three-wheel vehicles on the market, a refund for four-wheel vehicles used by children under 16 years old, extensive public notice of the risk involved with the products, and "hands-on," industry-sponsored training for all past and prospective buyers.⁶³

Public safety had prevailed, but only temporarily. Facing an enormous financial loss, the ATV industry signaled it was going to strenuously fight the recall. Having suffered a series of debilitating budget cuts for the previous five years, the CPSC lacked the resources to mount a forceful defense. However, a provision in the Consumer Product Safety Act gave the agency an attractive option: the right to seek representation against manufacturers from the Department of Justice (DOJ). In February 1987, CPSC asked the DOJ for litigation resources and other help in enforcing the ATV recall. The department had 45 days to decide whether or not to take the case. By now, ATV sales, having peaked at 650,000 units in 1984, had begun to decline, dipping to 461,000 in 1986; however, ATV-related deaths continued to rise, peaking at 299 in 1986.

Facing the very real threat of a recall, ATV manufacturers shifted into overdrive. Sparing no expense, they hired Lloyd Cutler, founding partner of the Washington, D.C., law firm Wilmer, Cutler & Pickering, to represent their interests. A heavyweight in the

⁶¹ Letter from CPSC Commissioner Stuart Statler to Honorable John C. Danforth, Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, May 23, 1986.

⁶² Stuart Statler, interview with author, January 28, 2002.

Democratic party, Cutler had served as counsel to President Carter (and later, to President Bill Clinton). He gave the ATV industry direct access to Democrats on CPSC's oversight committees.

The 45-day deadline passed with no decision by the DOJ. By October 1987, when the agency had exceeded its deadline by more than six months, Congress once again intervened. Chiding Justice for its "unconscionable delay" in fulfilling its enforcement responsibility under the CPSA, the House Government Operations oversight committee urged the agency to tell the CPSC, once and for all, whether or not it would prosecute the case. While the DOJ was stalling, word leaked out to the ATV industry that the department's answer to CPSC was likely to be "yes." After months of stonewalling, manufacturers suddenly were interested in talking with DOJ and CPSC lawyers about an out-of-court settlement.

On December 30, 1987, the CPSC and the DOJ jointly announced a negotiated settlement with the ATV industry.⁶⁴ Manufacturers Honda, Yamaha, Suzuki, Kawasaki, and Polaris agreed to halt all further sales of new three-wheel ATVs and to initiate a consumer education program. But none of the 1.6 million ATVs already in use would be recalled. Commerce committee member Al Gore, Jr. (D-TN), a close colleague of ATV-lobbyist Lloyd Cutler, had taken the lead in convincing the DOJ to abandon the idea of a recall and to settle. The industry prevailed.

By the time Scanlon resigned, in October 1988, the agency was in shambles. Having failed to abolish the CPSC completely, the Reagan administration and the agency's congressional critics had successfully carried out "Plan B": Evisceration. Between 1981 and 1988, the agency's budget decreased from \$42.1 million to \$34.5 million, and its staff was reduced by almost 40 percent. In 1980, Chairman Susan King's

⁶³ *CPSC Fact Sheet*, "Summary Update on Injuries and Fatalities from All-Terrain Vehicles (ATVs), as of June 2001 for data through December 31, 2000."

⁶⁴ *CPSC press release #88-016*, March 14, 1988.

budget had been \$49 million. She had overseen 588 product recalls; by 1982 the number had dropped to 163.⁶⁵

<u>Year</u>	<u>CPSC Budget</u>	<u>CPSC Staff</u>
1981	\$42.1 million	891
1982	\$32.1 million	649
1988	\$34.5 million	519

In 1983, former CPSC Commissioner David Pittle had predicted the fate of the agency under the Reagan administration: “(The commission) now will depend more on the good will of industry to improve product safety,” Pittle said, “rather than on the powers that Congress gave them to use.”⁶⁶ Struggling to curb the ATV death toll, Commissioner Stuart Statler and CPSC staff came to understand that counting on industry’s good will to ensure product safety was risky business indeed.

The Post-Reagan Era: Rest & Reinvention

After Stuart Statler left the commission, President Reagan’s successor, George Bush, allowed the CPSC to languish for a year. Stymied without a quorum, commissioners Anne Graham and Carol Dawson were prohibited from rulemaking and any other agency work that required a vote. In 1990, President Bush filled the chairmanship slot with Jacqueline Jones-Smith, a Democrat whose husband, a Republican businessman, had helped raise more than \$600,000 for the Bush presidential campaign.⁶⁷ Consumer groups criticized the appointment, claiming that Jones-Smith, a staff attorney for the Federal Election Commission, had no experience on product safety issues. Although Jones-Smith was instrumental in convincing Congress and President Bush to increase the CPSC’s budget by 20 percent during her three years at the commission, her tenure was exceptional only in that nothing exceptional occurred. There were no major

⁶⁵ Fise, in Meier et. al.

⁶⁶ Molly Sinclair, “Loss of Zagoria to Send CPSC Further to Right,” *Washington Post*, December 23, 1983, p. B9.

⁶⁷ Staff writers, “CPSC is ‘Back in Business’,” *Washington Post*, January 30, 1990, p. A17.

Congressional battles over the agency's budget, authority, or future; nor were there any spectacular internal scandals. Perhaps unintentionally, Jones-Smith gave CPSC what it so sorely needed – a respite from eight long years of tumult.⁶⁸

In 1994, President Bill Clinton sent a mixed message to CPSC: first he chipped away about 7 percent of its budget, then he installed Democrat Ann Brown as its chairman. A Consumer Federation of America vice president, Brown was a veteran consumer activist, best known for her work exposing dangerous toys.⁶⁹ Brown hit the ground running. In 1978, Chairman Susan King had been quick to leave her calling card with members of CPSC's congressional oversight committees; in 1994 Chairman Brown's first order of business was shuttling off to New York to cut a deal with the television networks. To the chagrin of manufacturers, Brown quickly became a regular on ABC's "Good Morning America," then NBC's "The Today Show," reaching into the homes of millions of consumers with news of recalls and commission initiatives. Recognizing that the shortest path to America's heart was through its children, Brown made protecting babies and kids from dangerous products her top priority. In her first three months on the job, Brown began rulemaking on five-gallon buckets (children drown in them), fireworks, and baby walkers.⁷⁰ She stepped up the pace of recalls, most of them for children's products, including toy art sets, metal bunk beds, and pacifiers.⁷¹ "I'm going to sound immodest," Brown told the *Washington Post* only a few months after she took office, "But we have reinvigorated a demoralized agency."⁷²

⁶⁸ Media coverage of CPSC also slowed down after Jones-Smith took over. During the eight years of the Reagan presidency, when the agency was under attack, the *Washington Post* averaged about 200-250 stories a year about CPSC. During the Jones-Smith chairmanship, the paper ran less than 100 stories a year.

⁶⁹ Knight, Jerry, "Agency Lauds Adult-Friendly Childproof Cap," *Washington Post*, March 30, 1994, p. C1.

⁷⁰ Skrzycki, Cindy, "Shaking up the CPSC with an Armload of Initiatives," *Washington Post*, July 8, 1994, p. F1.

⁷¹ CPSC press release #94-124, September 7, 1994 (art sets); press release #95-013, October 25, 1994 (bunk beds); press release #95-001, October 3, 1994 (pacifiers).

⁷² Skrzycki, July 8, 1994.

As Republicans captured Congress in 1995 and House Speaker Newt Gingrich (R-GA) drafted his “Contract With America,” CPSC was believed to be an easy target for the new band of strident deregulators. “They are so small they may be zeroed out,” warned Edward Hudgins, director of regulatory studies at the Cato Institute.⁷³ Yet this time CPSC was spared, due in large part to Brown’s political savvy. Rather than positioning the agency as a victim of previous administrations, deserving of Congress’s pity (and funding), Brown declared the CPSC to be worthy of emulation. Following the marketing savvy of the corporations she regulated, Brown listened closely to what Congress wanted and gave it to them. In her first *Annual Report to Congress* in 1994, she skillfully used the predominant rhetoric of the time (both in the Democratic White House and the Republican Congress) to portray CPSC as the best bargain in government:

I am delighted to report to you CPSC’s efforts at government reinvention and regulatory reform. CPSC should serve as a model for all government agencies. With a staff of less than 500 and the same budget it had in 1979, CPSC exemplifies streamlined, effective, and efficient government that works with industry and the public to achieve its mission to reduce deaths and injuries associated with consumer products.⁷⁴

In one important respect, Brown’s pragmatism paid off: during her reign, no one in OMB or in Congress declared war on her agency, CPSC reauthorization hearings were not especially contentious, and no legislation was passed that further eroded the agency’s authority. But Brown was not so much impelled by President Clinton and Congress to carry out the CPSC’s mandate as she was simply tolerated. That she was never able to convince Congress and the White House to authorize more than \$1-2 million annual budget increases to her Lilliputian agency suggests that consumer product safety still was not near the top of anyone’s priority list. Money talks, and on this front, Congress and President Clinton were silent. In 1997, the GAO investigated how CPSC was allocating its resources. At the time, the commission’s budget was \$42.5 million, with

⁷³ Skrzycki, Cindy, “Watchdog Agency Hopes to Escape Budgetary Ax,” *Washington Post*, January 26, 1996, p. A23.

⁷⁴ Consumer Product Safety Commission, *1994 Annual Report to Congress*, p. 1.

480 full-time equivalent employees. “(A)fter adjusting for inflation,” the GAO calculated, “the agency’s budget has decreased by about 60 percent since 1974. Similarly, the CPSC’s current staffing level represents 43 percent fewer positions as compared with the agency’s 1974 staff.”⁷⁵ Throughout the 1980s, the White House and Congress hadn’t hesitated to snatch chunks of CPSC’s budget. But once the Democrats were back in office, there wasn’t so much as a whimper of a suggestion that the agency’s funding be restored to its pre-Reagan levels.

“They’d give us an extra \$1 million, and we were supposed to be happy,” said Pamela Gilbert, Ann Brown’s former executive director, after she left the agency in 2001. “Eventually, someone will see that the American people support us, people want government to make sure products are safe, they want government to spend money on this.”⁷⁶ But no one with budget clout has seen this yet, perhaps because Brown was so intent on proving to her funders just how little money she could get by on. How much does the agency need to do its work? “At a minimum,” Gilbert calculates, “CPSC should have a \$100 million budget.” As chairman, Brown never uttered a number anywhere near this goal.

By 2001, the CPSC’s budget had increased slightly, to about \$50 million (Susan King’s 1980 budget had been \$49 million), while its staffing remained stuck at 480 positions. Meanwhile, the fiscal imbalance between regulators and industry widened; many of the industries the CPSC oversees enjoyed explosive growth throughout the 1980s and 1990s, as evidenced by the bulging shelves at power retailers like Home Depot and Toys “R” Us. The fallout of this resource inequity permeates virtually every aspect of the commission’s work.

During the Reagan era, the story of the CPSC was how the agency was being plundered by its enemies. Brown set out to rotate this story one hundred and eighty

⁷⁵ *GAO/HEHS-97-147*, “Better Data Needed to Help Identify and Analyze Potential Hazards,” September 1997, pp. 4-5.

degrees. Intent on boosting the commission's profile, Brown's public affairs office flooded the media with press releases touting the agency's accomplishments. Instead of reading in the morning paper about CPSC's squabbles with Congress and the White House, consumers learned how to protect themselves from faulty electrical wiring in fax machines, power strips, and light switches, and how to protect their children from bicycle accidents, bath water that was too hot, and small parts in toys. Brown stepped up the pace of recalls and corporate civil penalties. The Scanlon commission never recalled more than two-hundred products a year; Brown hit 439 her first year in office.⁷⁷ Scanlon showed little enthusiasm for levying civil penalties against companies that failed to self-report product hazards; in 1988, the commission fined three companies a total of \$190,000. By contrast, Brown filed suit and won penalties against seventeen recalcitrant firms her first year in office, totaling more than a million dollars.⁷⁸ Like her Democratic predecessor, Susan King, Brown fully understood that Congress funds results, and that there are no better results than big numbers. In the CPSC's *2000 Report to Congress*, Brown boasted that her agency had:

- levied \$2.8 million in civil penalties against 11 firms,
- recalled 90 million product units,
- fielded 4,100 consumer complaints of unsafe products, and
- reached 69 million consumers with safety messages.

Clearly, Brown and her staff kept busy. That the regulators were busying themselves with the *right* tasks is less clear.

Brown made little headway toward solving profound problems that have plagued the agency for thirty years:

- companies widely ignore the hazard self-report requirement of the CPSA,

⁷⁶ Pamela Gilbert, interview with author, November 28, 2001.

⁷⁷ "CPSC Product Recall Summary," fax sent to author by Ken Giles, CPSC Office of Public Affairs, September 29, 2001.

- the product recall system is a dismal failure at reaching into homes and getting dangerous products out of use, and
- hundreds, sometimes thousands, of consumers are injured by products well after the CPSC knows a problem exists – simply because a CPSA amendment severely restricts what regulators can divulge to the public.

These issues, masked by the numbers that Brown and her predecessors have chosen to offer as measures of CPSC’s efficacy, are the agency’s Achilles heel.

Most Product Hazards Are Not Reported

In 1992, executives at Century Products’ crib division, Okla Homer Smith, decided to change the way the company’s wooden cribs were assembled. The cribs’ side slats would no longer be glued and nailed into place; they would be glued only. The decision was a poor one. The glue wasn’t strong enough to keep the slats from coming loose, and in some cases detaching completely from the crib.⁷⁹ If a crib’s side slats are spaced too far apart, a small neck or head can become entrapped and a child can be asphyxiated. Missing slats on the Century cribs posed this sort of hazard, violating the CPSC’s mandatory crib standard.

In February 1993, ten months after Century began selling its glue-only cribs, the company learned that a child had been entrapped in one of the cribs, but not killed, when a side slat came loose. A few weeks later, a second child was entrapped. Then it happened again. And again. By June 1993, Century had learned that five children had been entrapped in broken cribs. Despite knowledge of these five incidents, the company continued to sell the glue-only cribs and did nothing to warn its customers of the hazard. In September 1993, a sixth child was entrapped in a crib that had a missing slat. This time, the child was killed. Nevertheless, Century continued to sell the hazardous

⁷⁸ “Civil Penalty Matters Under the CPSA, FHSA and FFA, Amount of Penalties Assessed Fiscal Years 1988-2002,” fax sent to author by Ken Giles, CPSC Office of Public Affairs, September 29, 2001.

⁷⁹ Details of the Century Products crib case are found in the company’s settlement agreement with the CPSC: *CPSC Docket no. 98-C0003*, December 24, 1997.

cribs. Not until January 1994, after 278,000 cribs had been sold, did the company take action. The old manufacturing process was reinstated, and the slats were nailed to the crib as well as glued.

Section 15(b) of the CPSA requires a company to notify the CPSC within twenty-four hours of learning that a product defect may pose “a substantial hazard” or create “an unreasonable risk” of injury or death.⁸⁰ Ignoring the statute, Century didn’t say a word to the CPSC about the injuries or death caused by its cribs. In failing to do so, the company allegedly broke the law.

CPSC staff found out about the death on their own. When regulators contacted Century to learn details of the incident, the company’s lawyers confirmed that a child had been killed. Claiming the death was a case of “product misuse,” Century’s lawyers failed to disclose details about the hazardous cribs. CPSC staff did not yet know about the five non-fatal entrapments, and Century lawyers did not mention them.

Though Century was not legally obligated to discuss the crib with CPSC staff during their initial phone calls, the company could not avoid disclosing what it knew once the CPSC required it to file a full “Section 15” report, the first step in a recall investigation. In the report, Century was obligated to reveal details of the crib’s design, testing, and manufacturing process and to provide a full account of all consumer complaints, injuries and deaths. CPSC would use this information to determine whether or not the product was dangerous enough to recall.

Under pressure from the CPSC, the company filed its full Section 15 report on June 30, 1994. For the first time, the agency learned of the five non-fatal entrapments. Sixteen months had passed since Century had learned about the first entrapment – substantially longer than the twenty-four hours required for hazard self-reports. Century agreed to recall the cribs in February 1995, two years after the first entrapment.⁸¹

⁸⁰ “Office of Compliance – Section 15(b) Internet Report,” [Hwww.cpsc.gov](http://www.cpsc.gov)H.

⁸¹ *CPSC press release #95-076*, February 10, 1995.

This was not the first time Century, one of the nation's largest manufacturers of baby products, had failed to report a product hazard. In 1995 and 1996, the company's popular Travel-Lite Sport stroller proved to have not just one defect, but two. More than 500 consumers complained to Century that when the stroller's front wheels hit a curb, the stroller folded unexpectedly – with the child inside it. Sixty more consumers reported that the stroller's restraint buckle didn't work, causing children to fall out, and leading to at least forty-nine injuries. The company waited a year to report the problem.⁸² By the time the stroller was recalled in April 1997, the company had sold 166,000 strollers and logged 1,400 consumer complaints, including seventy-eight reports of injuries.⁸³

Section 15(b) of the Consumer Product Safety Act granted the CPSC the authority to fine Century \$1.25 million for each of the two dangerous products – the strollers and cribs. But Century, like virtually every manufacturer caught violating the self-reporting statute, paid considerably less. The penalty for failing to report the defective cribs and strollers: \$225,000, combined; the CPSC agreed to settle the two violations simultaneously.⁸⁴ To Century Products, a company that was bought by Graco Children's Products (a division of Rubbermaid, Inc.) for \$77.5 million a few months after the crib/stroller case was settled, the fines were little more than a slap on the wrist.⁸⁵

Congress wrote the Section 15(b) self-reporting requirement into the Consumer Product Safety Act with the goal of placing the burden of hazard identification on corporations and speeding up the recall process. Companies are likely to learn that one of their products is hazardous long before the CPSC is privy to this information, Congress reasoned; therefore, the onus should be on companies to self-report.

What Congress failed to address, however, is the fact that manufacturers have little incentive to fess up to regulators. A Section 15(b) self-report often initiates a CPSC

⁸² *CPSC Docket no. 98-C0003*, December 24, 1997.

⁸³ *CPSC press release #97-102*, April 16, 1997.

⁸⁴ *CPSC press release #98-064*, February 9, 1998.

⁸⁵ *Cleveland Plain Dealer*, May 20, 1998.

investigation, a process welcomed by a company about as readily as a private citizen welcomes an IRS tax audit. The process is burdensome, expensive, time-consuming, and often ends with bad news – a product recall. Sometimes a more appealing strategy is for the manufacturer to quietly fix the defect without notifying anyone – neither its customers nor the CPSC – and hope regulators don't find out.

As early as 1983, the CPSC became concerned that companies had little motivation to self-report product hazards. In Senate committee hearings, one CPSC official noted that, as the Reagan administration slashed the agency's resources, the number of Section 15(b) self-reports *dropped*. In 1989, Robert Adler, a University of North Carolina law professor who served as an attorney-advisor for two CPSC commissioners, did the math:

It seems inconceivable with agency jurisdiction over 10-15,000 different products distributed by over one million businesses that only 100 to 200 instances arise nationwide that would lead a company to report a possible substantial hazard. In sharp contrast, the Food and Drug Administration receives roughly 18,000 such reports . . . In addition, consumers file roughly 60-70,000 product liability lawsuits every year. Based on these statistics, one unavoidably must conclude that Section 15(b) is being widely ignored.⁸⁶

Five years later, a *Consumer Reports* article revealed that "few scofflaws are ever punished," largely due to the CPSC's lack of enforcement staff and cumbersome rules.⁸⁷ In the case that CPSC staff manages to find out about unreported injuries or deaths, Section 15(b) is written vaguely enough to allow a manufacturer's lawyers to build a strong defense of the company's failure to self-report. The statute does not explicitly state how many consumer complaints, injuries, or deaths constitute a "substantial hazard" or "unreasonable risk" of injury or death. Even if hundreds of children have been injured, as was the case with the Century strollers, company lawyers can trot out their pet defense: product misuse.

⁸⁶ Adler, Robert, p. 120.

⁸⁷ "Product Recalls, Less than Meets the Eye," *Consumer Reports*, November 1994, p. 732.

When the CPSC has evidence of a Section 15(b) violation, the agency can file suit against the company in civil court. If the parties cannot work out a pre-trial settlement, the suit goes to trial. When asked for examples of cases that have gone to trial, a CPSC public affairs officer said he was aware of only one case, against a company that manufactured automatic pitching machines. "I don't know when that was," he added, suggesting the event had not occurred very recently.⁸⁸ Why hasn't the CPSC pushed more cases to trial? A trial poses a resource drain the agency can't afford to undertake very often. Manufacturers, on the other hand, have a corral of in-house and outside counsel at their disposal. These lawyers are acutely aware of this resource imbalance when they join the CPSC at the pre-trial settlement table.

In recent years, due to Chairman Ann Brown's increased enforcement efforts, the number of hazard self-reports steadily increased, from 128 in 1984 to 210 in 1999.⁸⁹ During Brown's tenure, the commission levied more than \$21 million in civil penalties against eighty-six companies, including Toro, Safety 1st, L. L. Bean, and Hasbro, for failing to report hazards associated with such products as riding lawnmowers, toddler bed rails, backpack infant carriers, and child car seat/carriers. But given the millions of products on the market, the thousands of product liability lawsuits and hundreds of thousands of consumers who visit hospital emergency rooms with product-related injuries each year, it's clear Brown's enforcement efforts were a mere drop in the bucket.

CPSC continues to confront another drawback of manufacturer self-reports: companies tend to report the *least* severe hazards, while keeping knowledge of the most dangerous product defects to themselves. This is particularly true of children's products. Since 1996, manufacturers failed to report the hazards of 75 percent of children's

⁸⁸ Russ, Rader, CPSC public affairs officer, email communication with author, June 22, 2000.

⁸⁹ Russ Rader, CPSC public affairs officer, email communication with author, August 27, 1999.

products that the CPSC eventually recalled; regulators found out about injuries from consumers, or through their own surveillance methods.⁹⁰

The Product Recall System Fails to Get Recalled Products Out of Use

Because CPSC staff cannot rely on manufacturers to self-report hazards, they have learned to sniff out dangerous products on their own. The CPSC jump-starts its hazard identification process with a consumer hotline, a toll-free number the public can call to complain about defective products. This is one place a consumer can be sure her voice is heard: The agency closely monitors the calls for tips that will lead investigators to products that may need to be recalled. However, most people have no idea the hotline exists – each year, about 4,000 consumers call it to report hazards associated with all CPSC-regulated consumer products, including infant equipment, toys, yard and garden equipment, power tools, construction materials, sports equipment, and home appliances.⁹¹ Despite Chairman Brown’s efforts to bring visibility to the agency, most consumers still have no idea what the CPSC is, what it does, and why they should report product-related injuries to the agency’s hotline.

CPSC’s main source of information about product-related injuries is its own hospital reporting system.⁹² At 100 hospitals across the U.S., CPSC has installed computer systems and trained staff to collect data on emergency room visitors with product-related injuries. This information is stored in the CPSC’s National Electronic Injury Surveillance System (NEISS) database and is available to regulators within seventy-two hours of an incident. To augment the emergency room data, consumers’ and companies’ less-than-satisfactory reporting, CPSC staff rely on a patchwork of external data sources, including newspaper stories about product-related injuries and deaths, coroner reports, insurance investigations, reports of lawsuits, and even manufacturers

⁹⁰ O’Donnell, Jayne, “Child Dangers Ignored: 17 Firms Kept Quiet Problems Quiet,” *USA Today*, April 3, 2000, p. 1A.

⁹¹ *CPSC 1998 Annual Report to Congress*, p. 17, [Hwww.cpsc.gov](http://www.cpsc.gov)H

⁹² *GAO Report HEHS-97-147*, September 29, 1997.

who call the agency to report on competitors' unsafe products. At best, these sources paint an incomplete picture of product-related injuries and deaths.⁹³

"Because the CPSC's data sets reveal only a portion of the injury picture," says a 1997 Government Accounting Office report, "the agency underestimates the total numbers of deaths and injuries associated with any given consumer product."⁹⁴ Undercounting means it can take months, even years, for CPSC to pick up a product injury trend. The CPSC's data collection techniques are particularly troubling when a product turns out to be deadly. Because product-related deaths are relatively rare events, it is not likely that a victim will show up at one of the 100 hospitals that report to CPSC. If the coroner or medical examiner involved in the case doesn't know to contact CPSC immediately, the agency may find out about the death after a delay, or may never find out about it at all. In the event the agency does learn of the death, manufacturer's lawyers can, and do, argue that the death may have been associated with the product, but was not caused by it. While the corporate attorneys bicker with CPSC staff over this point, the product remains on store shelves and in consumers' homes. This was the case with Hasbro's Travel-Lite portable crib.

In the late 1980s, children's product company Hasbro struck a deal with manufacturer Kolcraft Industries. Hasbro agreed to license its Playskool brand name to Kolcraft, which would manufacture, distribute, and market the Playskool Travel-Lite portable crib. The crib was launched in January 1990.

In July 1991, seven months after the Travel-Lite launch, Roberta Gonzales put her eleven-month-old son Anthony down for a nap in his Playskool Travel-Lite crib.⁹⁵ Roberta waited ten minutes, long enough for Anthony to fall asleep, before checking on him.

⁹³ See Felcher, Marla E., *It's No Accident: How Corporations Sell Dangerous Baby Products*, Common Courage Press, Monroe, ME, 2001, pp. 66-70 for extensive description of CPSC injury and death data system.

⁹⁴ *GAO Report HEHS-97-147*, September 29, 1997.

⁹⁵ *CPSC In-Depth Investigation Report #910906HCC0239*, October 8, 1991. (all Travel-Lite victims names have been changed, except Danny Keysar's, to protect anonymity of family)

What Roberta found was this: Anthony's portable crib had collapsed, trapping the infant's neck in the "V" formed by the folded side rails. Roberta pulled her son from the crib, started CPR, and called 911. The infant died in the hospital two days later.

The L.A. Police Department reported Anthony's death to the CPSC right away, and the CPSC in turn notified Hasbro. "With respect to the above-mentioned [Anthony's death]," Hasbro's lawyer responded to regulators, "kindly be advised that this is a product manufactured and distributed by our licensee, Kolcraft Enterprises . . . [W]e have put them on notice with respect to this product, and you should be hearing from them."⁹⁶ Hasbro had washed its hands of the matter. Kolcraft lawyers, in turn, denied that the crib was hazardous. "Nothing in the CPSC report or accompanying documents suggest at this point that the Travel-Lite portable crib is defective in any way, or presents a substantial hazard," stated John Staas, Kolcraft's executive vice president of operations.⁹⁷ No action was taken.

Four months after Anthony died, on Thanksgiving Day, 1992, Teresa Parkens of Siloam Springs, Arkansas, put her nine-month-old daughter Amanda down for an afternoon nap in a Playskool Travel-Lite crib. Two-and-a-half hours later, the young mother checked on her baby and saw this: The Travel-Lite crib had collapsed, trapping Amanda's neck in the "V" of the folded rails. Amanda was pronounced dead on arrival at the hospital.⁹⁸

A week after New Year's Day, 1993, Sophie Talling's babysitter put the eleven-month-old child down for a nap in her Playskool Travel-Lite crib. A little while later, when the babysitter went in to check on Sophie, she saw this: The Travel-Lite had collapsed,

⁹⁶ Donald M. Robbins, senior vice president/general counsel of Hasbro. Letter to Joel I. Friedman, CPSC, May 4, 1992.

⁹⁷ John Staas, executive vice president of operations, Kolcraft. Letter to Joel Friedman, CPSC, June 12, 1992

⁹⁸ *CPSC In-Depth Investigation Report # 930105HWE7003*, January 13, 1993.

trapping the baby's neck in the "V" of the folded rails. Sophie was pronounced dead at the hospital, becoming the Travel-Lite's third victim.⁹⁹

Sophie's death kicked off a full-fledged CPSC recall investigation. Marc Schoem, CPSC director of corrective action and compliance, notified Kolcraft President Bernard Greenberg that the agency had initiated a "preliminary determination of hazard."¹⁰⁰ The CPSC's goal was to determine whether or not the portable crib was dangerous enough to recall. By law, Kolcraft was required to send the CPSC any information the agency requested on the crib: product-testing data, engineering drawings, records of consumer complaints, pending lawsuits and warranty claims, assembly and use instructions, and two product samples for the CPSC engineers to test. Kolcraft (not Hasbro) had ten days to respond to the request.

On February 12, John Staas responded to Schoem's request with a full "Section 15" report, detailing the history of the Travel-Lite's distribution and marketing. In this letter, Staas noted that Sophie, the Travel-Lite's most recent victim, had been "left unattended" in her crib by a "21 year-old baby-sitting assistant who was supervising eight infants."¹⁰¹ Refusing to admit that the crib was hazardous, Staas nevertheless told the CPSC that Kolcraft had decided to recall it.

Agreeing to a recall generally means that the company will take two broad actions: notify retailers that the product must be pulled from store shelves and issue a press release to the media (major newspapers, television and radio stations). Notifying retailers of a recall is not difficult work; manufacturers typically keep good records of the stores that buy their products. Reaching consumers with recall news is decidedly more complex. Retailers of relatively inexpensive consumer products typically have no idea who has bought their products, much less who is using them.

⁹⁹ *CPSC In-Depth Investigation Report I #930114HCC3083*, January 14, 1993.

¹⁰⁰ Marc Schoem, CPSC director of recalls and compliance. Letter to Bernard Greenberg, president of Kolcraft, February 1, 1993.

The CPSC spreads recall news to consumers via press releases. With reporters and producers acting as middlemen, this strategy is hit or miss; the news will only reach consumers if the media picks up the story and if the consumer happens to be paying attention when the story runs. There is no law or regulation that requires manufacturers or the CPSC to notify consumers directly of a recall, by phone or by mail.¹⁰² Nor is there a law or regulation that requires manufacturers to advertise recalls in newspapers or magazines. And there is no law or regulation that requires manufacturers to demonstrate that recalled products are returned or taken out of use.

Almost every aspect of the recall, including its timing and how it will be carried out, is negotiated in highly secretive meetings between CPSC compliance staff, lawyers, epidemiologists, and test engineers, and the manufacturer's lawyers, product engineers, and public relations staff. Virtually every word used in a recall press release has been hashed out and debated.¹⁰³ While CPSC requires the press release to state how many people have been injured and killed by the product and to describe the types of injuries sustained, it is in the manufacturer's best interest to play down the product's hazards. "The manufacturer wants to minimize the hazards and the CPSC wants to maximize them," says Bengt Lager, whose company, Regal + Lager, is the exclusive U. S. distributor of Baby Bjorn products.¹⁰⁴ The result: The language in the final recall notice is often watered down, making it less likely to attract the attention of the media and consumers.

When CPSC staff can't convince a manufacturer to agree to any aspect of a recall – the wording of the press release, the remedy being offered to consumers (typically a "free" do-it-yourself repair kit), or even a concession that the recall is

¹⁰¹ "Section 15(b) Full Report: Playskool Travel-Lite Portable Crib," submitted by John A. Staas, executive vice president, Kolcraft Enterprises, Inc., February 12, 1993.

¹⁰² The exception is car seats. There is a NHTSA rule that requires manufacturers to enclose product registration cards with all new car seats. Consumers fill out the cards and mail them back to the manufacturer, postage free. If the car seat is recalled, the manufacturer is required to notify the registrant directly. The CPSC has tried to enact a similar rule for other baby products, but manufacturers, so far, have successfully fought these efforts.

¹⁰³ Anonymous CPSC regulator, interview with author, July 19, 1999.

warranted – the agency can sue. But a lawsuit against a manufacturer can take years to resolve, and while corporate legal coffers can sustain long, drawn-out court battles, the CPSC’s legal budget cannot. If the agency does take a company to court, the product under dispute can remain on the market while the case is being prepared for, settled, or tried.¹⁰⁵ When faced with a stubborn manufacturer, the CPSC must ask itself what is more important: suing over seemingly trivial semantics of a press release, or releasing *any* recall notice quickly so that the product will no longer be sold. On a daily basis, the agency must decide whether to siphon its budget into costly court battles or to allow a manufacturer to take actions that undermine public safety. “The agency is constantly assessing tradeoffs,” says former CPSC lawyer Bob Adler. Softening the language of press releases is just one of the “horrible agreements with the devil,” in Adler’s words, that the CPSC must make to get companies to agree to a recall.¹⁰⁶ The trade-offs CPSC made with the Travel-Lite crib turned out to be fatal.

After agreeing to a recall, Kolcraft executive V.P. of operations, John Staas, laid out a “corrective action plan” for the Travel-Lite portable crib, detailing the steps the company would take to notify retailers and consumers of the recall. The most effective way to get the crib out of use, the CPSC knew, would be for Kolcraft to notify the people who had bought the crib directly, by mail. But in this case, such notification methods would be impossible. “Kolcraft does not know how many cribs are in consumer’s [*sic*] hands,” Staas wrote to the CPSC. “Kolcraft has no information as to the names and addresses of consumers.”¹⁰⁷

Kolcraft agreed to take the following actions: issue a joint press release with the CPSC, notify the press of the recall, set up a toll-free hotline for consumers, send recall

¹⁰⁴ Lager, Bengt, president Regal + Lager, interview with author, August 30, 1999.

¹⁰⁵ Donahue, John D., “Fast Track Product Recall,” *Making Washington Work: Tales of Innovation in the Federal Government*, Washington, D.C., Brookings Institution Press, 1999, p. 25.

¹⁰⁶ Adler, Robert, interview with author, August 11, 1999.

¹⁰⁷ John Staas, executive vice president of operations, Kolcraft. Letter to Joel Friedman, CPSC, June 12, 1992.

notification letters and posters to retailers, and send a recall “notice” (not paid advertising) to targeted magazines. The company also intended to ask the American Academy of Pediatrics to notify its physician members about the recall.¹⁰⁸ Crib owners who returned the product to Kolcraft were offered a \$60 refund, though the crib’s retail price had been between \$69-89. When the CPSC suggested the refund should be higher, Kolcraft lawyers balked, responding, “most of these cribs [are] three years old.”¹⁰⁹

Under Chairman Brown’s leadership, CPSC put a lot of energy into producing and distributing video news releases (VNRs) – graphic videos of a recalled product’s hazard - - via satellite to local and network news stations. Kolcraft fulfilled its promise to produce a VNR demonstrating how the portable crib collapsed, then objected to the CPSC’s efforts to disseminate the tape. When the agency requested seventy copies to be sent to its forty-five field offices around the country, Kolcraft attorney Kerri Hook took exception. “[S]he said the company does not want 70 tapes out there; does not want the message replayed,” read CPSC notes of attorney Bill Moore’s conversation with Hook. Reiterating that “the word was already out,” Hook claimed Kolcraft was “very happy” with the response rate.¹¹⁰ At that point, 981 consumers – less than nine percent of Travel-Lite buyers – had returned their cribs to Kolcraft.¹¹¹ More than 10,000 cribs were still unaccounted for.

For the next three months, CPSC continued to keep track of the returned Kolcraft cribs, until the regulators agreed to close the file in June 1993.¹¹² The recall “was over.” At that point, 2,736 cribs had been returned; 76 percent were still unaccounted for.¹¹³

¹⁰⁸ Ibid. Initially, Kolcraft agreed to send a recall notification letter to the American Academy of Pediatrics and instructed the trade group to notify its members. Eventually, after CPSC prodding, the company agreed to notify the pediatrician members itself and sent each a recall poster.

¹⁰⁹ Notes written by CPSC attorney William Moore during phone conversation with Kolcraft attorney Kerri Hook, March 10, 1993.

¹¹⁰ Ibid.

¹¹¹ Recall effectiveness report from Kolcraft to CPSC, March 29, 1993.

¹¹² Marc Schoem. Memo to Terri Rogers, June 7, 1993.

¹¹³ “Corrective Action Plan Progress Report” filed by Kolcraft with CPSC, July 12, 1993.

News of the recall never reached Sherry Miller, an Indianapolis babysitter who owned one of the Playskool Travel-Lite cribs that remained in circulation. On October 10, 1996 – two-and-a-half years after the recall – Sherry put ten-month-old Christian Hastings down for his morning nap in a Playskool Travel-Lite crib. When she checked on the child, Sherry saw this: the portable crib had collapsed, trapping Christian’s neck in the “V” of the folded rails. Christian was dead, the Travel-Lite’s fourth victim, the first to be killed *after* the recall.¹¹⁴

On May 12, 1998, seventeen-month-old Danny Keysar’s babysitter put the toddler down for a nap in a Travel-Lite portable crib, in her Chicago daycare home. When she checked on Danny a short while later, she found this: the portable crib had collapsed, trapping Danny’s neck in the “V” of the folded rails. Danny was the Travel-Lite’s fifth victim, the second to be killed after the recall.¹¹⁵

On August 19, 1998, ten-month-old William Conahan’s babysitter put the infant down for his nap in a Playskool Travel-Lite crib at 3:00 p.m. When she checked on him less than two hours later, she found this: the crib had collapsed, trapping William’s neck in the “V” of the crib’s folded rails. The infant was pronounced dead on arrival at the hospital, becoming the Travel-Lite’s sixth victim, the third to be killed after the recall.¹¹⁶

To this day, Kolcraft, Hasbro and the CPSC have little idea how many Travel-Lite cribs are still in use.

“I’d just like to see the system get better,” said Rose Malden, a mother whose infant son was killed by a recalled cradle that killed over a dozen babies between 1991 and 1992.¹¹⁷ The system has not gotten better. In many respects it has gotten worse, as companies pump new products onto the market at a record pace, and overworked

¹¹⁴ CPSC *In-Depth Investigation Report #961015CAA6007*, October 15, 1996.

¹¹⁵ CPSC *In-Depth Investigation Report #980513CNN0280*, May 13, 1998.

¹¹⁶ CPSC *In-Depth Investigation Report I # 980820CNE5258*, August 12, 1998.

¹¹⁷ Cullen, Kevin, “Deaths in Cradles Haunt Families: Concerns Raised in Design, Testing,” *Boston Globe*, August 4, 1994.

regulators too easily buckle to company pressure to “close” recall files, knowing that 70 or 80 percent of the recalled units could still be in circulation.

Industry Gags the Agency

As the federal depository of product-related injury data, CPSC files are thick with documents that chronicle, in excruciating detail, how people are injured and killed by common household products. Accounts of portable cribs that collapse and strangle toddlers, chain saws that slash throats, and ATVs that flip over and kill teenagers make flashy journalism. Stories like these, widely reported, can send a company’s stock into a free-fall. Manufacturers have a strong incentive to keep news of this sort out of the public limelight. Section 6(b) of the CPSA gives them the right to do so.

When it wrote section 6(b) into the CPSA, Congress sent a mixed message to the CPSC. On one hand, the CPSA required the agency to “collect, investigate, analyze and disseminate injury data and information” related to product injuries and death.¹¹⁸ On the other hand, the 6(b) statute restricted the agency from releasing information to the public that identified a specific brand or manufacturer by name.

CPSC staff originally interpreted 6(b) as applying only to information the commission initiated itself, such as press releases and the commissioners’ public statements, not documents like consumer complaints, which the agency was merely collecting. Surely, the commission reasoned, the intent of 6(b) had not been to deny the public access to these sorts of records, commonly requested by doctors, lawyers, and journalists under the Freedom of Information Act (FOIA).¹¹⁹ The FOIA, enacted by Congress in 1966 under the belief that “an informed electorate is vital to the proper operation of a democracy,” stipulated that CPSC had to respond to citizen request for documents within ten days.¹²⁰

¹¹⁸ Adler, Robert, p. 67.

¹¹⁹ Ibid, pp. 106-117 for discussion of 6(b).

¹²⁰ Zollers, Frances E., “Consumer Product Safety Act Section 6(b), The Freedom of Information Act and Information Disclosure Patterns Within the Consumer Product Safety Commission: Lessons Learned,”

Manufacturer GTE Sylvania was of the opinion that the restrictions placed on the CPSC by 6(b) superseded FOIA law, and sued the agency after it released information that the company preferred not to have disclosed. After the Third Circuit Court of Appeal ruled in favor of GTE in 1978, CPSC pushed the issue to the Supreme Court. There, GTE Sylvania won again.¹²¹

“The linchpin of a perfectly functioning market is that consumers and producers be fully cognizant of the risks their choices entail,” writes economist Kip Viscusi.¹²² Yet the same politicians and business executives who oppose regulation in deference to “letting the market speak” have often been the most enthusiastic advocates of statutes that restrict what the public will hear about product hazards.¹²³ Testifying at the CPSC’s 1981 reauthorization hearings, executives representing the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Chain Saw Manufacturers Association complained to CPSC’s Senate oversight committee that, despite the Supreme Court’s ruling, regulators still had the ability to release documents that could jeopardize a company’s sales. Attorney Andrew Krulwich, former general counsel of the CPSC, articulated the tradeoff in his testimony: “If you phrase the question, should the Commission blast forth with preliminary information that may unfairly disparage a product or injure a business? The answer is clearly no. But should the Commission sit on information about a potential hazard that may kill someone until the Commission has conducted lengthy tests to conclusively prove the hazard? I think the answer there is

Consumer Safety and Industry Compliance with the New Reporting Requirements of the Consumer Product Safety Commission: A Blueprint for Cooperation in the '90s, American Bar Association, 1992.

¹²¹ Adler, Robert, p. 108.

¹²² Viscusi, Kip, *Regulating Product Safety*, American Institute for Public Policy Research, Washington, D.C., 1984, p. 2.

¹²³ In 1983, when the CPSC asked Congress to amend the CPSA to allow the agency greater freedom to disclose product-related injury data, the National Association of Manufacturers and the U.S. Chamber of Commerce, Procter & Gamble and General Electric formed an “information and contact” task force to lobby Congress against CPSC’s proposal. See Sinclair, Molly, “Hill Battle Brewing Over Release of Consumer Hazard Reports,” *Washington Post*, February 13, 1983, p. G11.

also no.”¹²⁴ Aaron Locker, representing the U. S. Chamber of Commerce, expressed industry’s stance: “I would prefer to see the Commission not be able to release any information submitted to it ... where the person or submitter takes the position that there is no defect or substantial hazard,” the defense attorney said. “... I don’t think that information should be released without the consent of the submitting party.”¹²⁵

Industry’s position prevailed. In 1981, Congress amended Section 6(b) of the CPSA, further restricting the agency from releasing documents collected by staff in the course of an investigation. Before the agency sends anyone information on any specific brand or company, whether they are journalists, consumer advocates, lawyers, or parents seeking safety advice, the CPSC must notify the company of the request, then send them the documents to review. The company has thirty days to study this file. If the company disputes the accuracy or fairness of any document, the CPSC must determine whether or not these concerns are legitimate. When the parties don’t agree, the CPSC’s Office of General Counsel gets involved, and suddenly the request for information has become a federal case. Ultimately, the dispute can go to court, but the CPSC has little incentive to take such matters this far. Because of its funding woes, the agency is unlikely to make a 6(b) legal battle one of its top priorities. Manufacturers know this. “Any manufacturer willing to contest a pending release of information about its product,” says former CPSC lawyer Bob Adler, “can delay, and occasionally prevent, its release.”¹²⁶

Today, when regulators are asked what most undermines CPSC’s ability to disseminate product safety information to the public, many respond with a resounding “6(b).” Former Commissioner Anne Graham, appointed by President Reagan, described the statute’s effect on the agency’s work: “You know there is a problem, but you (as a commissioner) can’t tell anybody about it until you go through the staff and you contact

¹²⁴ *Consumer Product Safety Commission Hearings Before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation*, U. S. Senate, 97th Congress, Serial No. 97-35, U.S. Government Printing Office, Washington, D.C., April 1, 2, 3, and 7, 1981, p. 5.

¹²⁵ *Ibid*, p. 9.

the industry. I'm not against trying to cooperate with industry but CPSC should not sit on something for a year when they are almost 99% sure there is a problem. The commission does not act quickly."¹²⁷ Evidence of regulators' inability to act quickly can be seen in many of the agency's recent recall press releases. The Black & Decker Spacemaker Optima Model toaster was responsible for more than 1,000 household fires before the CPSC recalled it. Cosco received about 3,000 complaints regarding its tandem stroller, including 200 injured babies, before the product was recalled. And regulators knew of nearly 400 reports of fuel tank leaks on Lawn-Boy mowers before the product was taken off the market.¹²⁸

CPSC's Report Card

In 1970, the National Commission on Product Safety notified Congress that consumer products were injuring 20 million Americans and killing 30,000 each year. The Commission judged these numbers to be "unreasonable ... and excessive by any standard of measurement."¹²⁹ The CPSC was created to address these unacceptably high numbers. Today, according to CPSC estimates, consumer products injure 29 million Americans and kill 22,000.¹³⁰ In the thirty years CPSC has been at work, product-related deaths have decreased, but injuries have *risen* by at least 45 percent.

Why has the number of product-related injuries soared? Plausible explanations include population growth, the proliferation of consumer products in our lives, an increasingly litigious citizenry that is more likely to report injuries, and industry's efforts to countervail consumer protection. But there is another important factor, one unrelated to environmental trends: CPSC's internal performance measures.

¹²⁶ Adler, Robert, p. 114.

¹²⁷ Anne Graham, interview with author, January 25, 2001.

¹²⁸ See the following CPSC press releases for details of these recalls: #98-097, April 23, 1998 (Black & Decker toaster); #99-062, February 17, 1999 (Cosco stroller); #02-060, December 11, 2001 (Lawn-Boy mower).

¹²⁹ *NCPS Final Report*, p. 1.

¹³⁰ Giles, Ken, CPSC office of public affairs, email communication with author, December 14, 2001.

Recalls are up! Civil penalties are up! TV appearances are up!, Ann Brown bragged to Congress, to the White House, and to the American public. *Look at all we've done, and with so little money!* Brown did indeed hit new, impressive benchmarks. What she failed to do is make a dent in product-related injuries. Keeping the numbers up, via traditional enforcement measures like recalls and civil penalties, and image-building measures like press releases and television appearances, has distracted the commission from addressing the one measure that matters: the number of people injured and killed by consumer products.

CPSC's enforcement dilemma is not unique. George Hawkins, a senior Environmental Protection Agency (EPA) executive in New England, explained the obstacles he faced in his effort to change the way EPA measured its progress:

Society would be crazy to judge the success of an enforcement enterprise on its ability to maintain levels of violations. Yet this is exactly how EPA's enforcement is judged. Each year, the numbers of inspections, fines, and civil and criminal actions are counted. Any drop in the numbers is considered not to reflect a reduction in violators, but a lack of effort [on behalf of] the EPA.¹³¹

Abandoning traditional measures of enforcement is tough work. Regulators like George Hawkins and Ann Brown are likely to find themselves in the position of having to prove to their constituents that lower enforcement numbers reflect better company compliance, rather than a slacking off of an agency's enforcement efforts. To make this argument, though, the agency needs a measurement system that can serve as a reliable barometer of the agency's performance. CPSC has no such system. Although the commission is in the product safety business, in fact, regulators cannot say with certainty how many people are injured and killed each year by consumer products.

In 1997, the GAO sharply criticized CPSC for grossly underestimating product-related injuries and deaths. Little has changed since then. In the 1970s the NEISS hospital reporting system included 119 hospitals; in 1997, it included 101 hospitals; and today, it

¹³¹ Sparrow, Malcolm K., *The Regulatory Craft*, Brookings Institution Press, Washington, D.C., 2000, p. 111.

includes 100. To what extent are the CPSC's data underestimated? By 10%? Thirty percent? Fifty percent? "The extent of this undercount," reported the GAO, "is unknown."¹³² What *is* known is that Brown had little incentive to carry out the GAO's recommendations on how to improve data collection on injuries and fatalities. Revamping the current system would *bump up* injury and death statistics. It would have taken some fast talking on Brown's behalf to explain to Congress and the public why injury and death statistics suddenly rose.

CPSC's risk-assessment system, CPHI, developed in 1973 to help the agency set priorities for product recalls and standard development, was abandoned decades ago. CPHI ranked products according to a "frequency-severity" index, based on data from NEISS, the agency's hospital emergency room system.¹³³ CPSC staff are quick to point out the flaws in CPHI, which undoubtedly exist, but the agency has failed to propose a program to replace it. In the absence of such a system, regulators too often set priorities according to constituents' demands. "The inadequacy of the (CPSC) information," reads the 1997 GAO report, "raises questions about CPSC's ability to make informed project selection decisions so that agency resources are being spent efficiently."¹³⁴ Fielding criticism on the original CPHI system in 1973, one agency official said, "I'd rather have a list telling us what to do than have (Senators) Magnuson or Percy telling us what to do. Any list is better than no list."¹³⁵ CPSC does maintain a list of criteria to help the commissioners decide which product hazards will make the agency's priority list. Frequency and severity of injuries, the unforeseen nature of product risks, and the vulnerability of the population are among the factors considered. Yet, there are no systematic checklists, scoring systems, or guidelines regarding how these criteria should be applied. It's no surprise, then, that the GAO investigators found that the

¹³² GAO/HEHS-97-147, September 29, 1997, p. 16.

¹³³ Gardner, Judy, "Consumer Report/New Safety Agency Ranks Product Risks as Guide for Proposed Regulatory Action," *National Journal*, October 6, 1973, p. 1489.

¹³⁴ GAO/HEHS-97-147, p. 22.

commissioners “expressed very different views on how some of these criteria should be interpreted.” Overhauling its NEISS reporting and risk-assessment systems should be at the top of CPSC’s to-do list.¹³⁶

Once its data issues are resolved, the commission will be in a better position to assess how, given its resource constraints, it can keep manufacturers from launching dangerous products onto the market. Regulators can choose one of two routes: promulgate strict, effective safety standards, or make it prohibitively expensive for a company to recall a dangerous product after it is already on the market. Mandatory safety standards are not a viable option; while pursuing this strategy in the 1970s, the agency came close to committing regulatory suicide. While voluntary standards are somewhat more worthy of agency resources, the fact remains that they are an industry-driven process. The second option, upping the costs of recalls, is far more attractive.

“[E]vidence suggests that recalls frequently are not taken seriously [by manufacturers], report professors Craig Smith of Georgetown University and John Quelch of the Harvard Business School. “Many companies seem satisfied with low recall response rates ... which, while meeting the letter of the law, may leave many consumers dissatisfied if not endangered.”¹³⁷ CPSC recalls hundreds of products each year, but so what? Recall news often fails to reach consumers, leaving dangerous products in circulation, sometimes for years. Rarely paying to advertise recalls, companies routinely foist responsibility for disseminating the bad news onto the press. Companies should view recalls as a *catastrophic* event, not as a trivial, tax-deductible cost of doing business.

There is no subject more likely to elicit excuses, finger-pointing, misleading statistics, and half-truths than the issue of recall effectiveness. Every time consumer response to a recall hovers between 10 and 30 percent, everyone looks bad. Why have

¹³⁵ Kelman, Steven, pp. 101-102.

¹³⁶ GAO/HEHS-97-147, p. 23.

¹³⁷ Smith, Craig and John Quelch, “Managing Product Recalls,” *Ethics in Marketing*, Irwin, Homewood, IL, 1993, p, 361.

regulators been reluctant to flex their regulatory muscle and force manufacturers to do a better job of disseminating recall news to the public? "We have to balance the risk of the product with the effort the company needs to take," CPSC compliance director Marc Schoem told the *South Florida Sun-Sentinel* in 1999. "Not every company is a General Electric or a Whirlpool or a Fisher-Price that can afford to do a recall and spend \$10-, \$15-, or \$20 million."¹³⁸

Schoem's remarks are troublesome for a number of reasons. First, the large corporations he mentioned may occasionally spend large sums of money on recalls, but this is not the norm; GE's definition of a "risky" product may not be the same as CPSC's. Second, large corporations are often just as ineffective at getting recalled products back as companies that spend considerably less. Most of the money spent on recalls goes toward getting unsold products back from retailers; considerably less is spent getting hazardous products back from product owners.

In 1982, when seven people died after taking Tylenol, manufacturer Johnson & Johnson (J & J) wasted no time recalling 22 million bottles of its top-selling pain reliever.¹³⁹ CEO James Burke flew to Washington on a company helicopter to enlist the help of the FDA. The company ran a series of 60-second television and radio ads on all the major networks, urging consumers to throw out their bottles of Tylenol and promising to replace them with a safer product. J & J spent over \$100 million on the recall. Poisoned Tylenol killed seven people. The Playskool Travel-Lite crib has killed six children so far, and similarly designed cribs have killed another nine. ATVs have killed thousands. Yet corporate response to these tragedies could not have been more different from that of J & J.

¹³⁸ Lipka, Mitch, "Consumers Don't Get the Word on Hidden Dangers," *South Florida Sun-Sentinel*, November 28-30, p. 5.

¹³⁹ Beck, Melinda, "The Tylenol Scare," *Newsweek*, October 11, 1982. See also: Rick Atkinson, "The Tylenol Nightmare: How a Corporate Giant Fought Back," *The Kansas City Times*, November 12, 1982 and Jerry Knight, "Tylenol's Maker Shows How to Respond to a Crisis," *Washington Post*, October 11, 1982.

Like J & J, CPSC regulators know how to get recalled products out of use; they have studied the issue for years. They've even cajoled a couple of companies into using their techniques -- direct mail notification of consumers, paid ads in targeted outlets such as special interest magazines (e.g., parenting, sports, etc.), and offers of cash refunds significantly above the product's original purchase price.¹⁴⁰ All have worked. Yet in recent years, as the focus has turned from the effectiveness of enforcement action to the quantity of products recalled, these techniques have been pushed aside.

Equally disturbing is Schoem's implication that a company's *ability to afford* a recall weighs heavily into the decisions being made by the nation's top recall enforcement officer. CPSC's 26-year effort to keep "worm probes" off the market illustrates the fallout of Schoem's logic -- particularly in the case of products covered by neither a mandatory nor a voluntary safety standard.

In 1976, CPSC convinced Terrann Industries, Inc., to recall 6,000 Baitcatcher worm probes, a metal rod used to bring worms to the surface of the earth by delivering an electric current into the soil. Although CPSC's 1976 press release did not say how many people the product had injured, it did note that the product's electric current sometimes shocked its users.¹⁴¹

In 1988, CPSC sued worm probe manufacturer P & M Enterprises, when the company refused to recall its WORM GETT'R probes.¹⁴² The product's flawed design exposed users to bare metal shafts charged with 720 volts of electricity. While regulators were not aware of any WORM GETT'R deaths, they did know that at least 23 people, including 13 children, had been killed by similarly designed worm probes.

¹⁴⁰ Murphy, Dennis and Paul H. Rubin, "Determinants of Recall Success Rates," *Journal of Products Liability*, 11, 1988, pp. 17-28. Also see: Loren Lange, "Recall Effectiveness Study," Office of Strategic Planning, Consumer Product Safety Commission, May 1978, and "Report of the Recall Effectiveness Task Force of the Consumer Product Safety Commission, August 25, 1980.

¹⁴¹ CPSC press release #76-035, June 2, 1976.

¹⁴² CPSC press release #88-009, February 29, 1988.

Terrence Scanlon, the CPSC chairman at the time, urged his fellow commissioners to get off of the worm probe industry's back. "Scanlon was trying to save the entire industry – all two of them," recalled former commissioner Anne Graham, who supported the recall. "And then Larry Craig (R-ID) got *very* upset. 'How *dare* you stop people from getting worms?' he asked us. There was one family making them. I didn't want to put them out of business," Graham said, "I just wanted them to stop killing people."¹⁴³

It took another three years for CPSC to recall the WORM GETT'R probes. "The product, which is used to shock worms out of the ground," read the recall press release, "Can expose users and passers-by to a lethal dose of electricity."¹⁴⁴ By then, P & M had sold 30,000 units, and CPSC knew of 28 worm probe-related deaths, most of them children. Although P & M Enterprises was prohibited from selling more worm probes, CPSC did not require the company to notify product owners of the recall. Why? P & M was a small, family business that, using Marc Schoem's language, could not "afford" to carry out a recall.

Another manufacturer, the Handy Marketing Company, continued to make worm probes, and K-Mart continued to sell them under the brand name WORM GETTER. WORM GETTERS were functionally equivalent to the recalled WORM GETT'Rs manufactured by the now-defunct P & M Enterprises. In 1993, CPSC recalled the Handy probes; by now, regulators knew of more than 30 probe-related deaths. "The Handy Marketing Company is now out of business," read the CPSC recall press release, "and is unable to participate in this recall."¹⁴⁵

A system in which dozens of fatalities caused by mom-and-pop firms are tolerated simply because the companies cannot "afford" a recall is unacceptable. CPSC regulators are well aware that compliance and enforcement issues differ between large and small companies. It is the agency's responsibility to figure out how to allocate

¹⁴³ Anne Graham, interview with author, January 25, 2002.

¹⁴⁴ CPSC press release #91-099, July 26, 1991.

its resources in a way that prohibits manufacturers of potentially lethal electrical products from killing dozens of people. This is what Congress and the American people have entrusted the commission to do.

Paradoxically, Ann Brown's efforts to keep the number of recalled product units high may have at times *undermined* product safety. Each time a product is recalled, the commission issues a press release. Agency public affairs officers gripe that journalists too often fail to give prominent play to recall news. But news directors' desks overflow with unsolicited "news" – press releases from government agencies, corporations, and non-profits, all angling for a precious column inch or a brief mention on the TV news. Lacking a clear indication of a product's hazard, and written in non-transparent legalese, the CPSC's press releases are too easily lost in the shuffle.

In the 1970s, CPSC took flack for using taxpayer dollars to issue press releases that did little more than dole out common-sense advice. "Football, the favorite pastime of many Americans, is also the most hazardous sport to play," read one of the agency's early releases. "Commission files show that 40 percent of all injuries (occur) among 15-19 year old boys."¹⁴⁵ More recent CPSC press releases have been no more enlightening. Plastic patio chairs sold at K-mart "have the potential to collapse ... (w)hen used aggressively or by a person who weighs more than 200 pounds."¹⁴⁶ Martha Stewart tea kettles were recalled because "boiling water can be expelled from the kettle's spout."¹⁴⁷ Gap Kids nylon windbreakers pose a lead exposure risk to children who have "ingested" the zipper.¹⁴⁸ It's no wonder news like this is more likely to wind up in the monologue of a late-night comedian than it is to be reported on the 6:00 local news.

Internally, CPSC categorizes recalls by their urgency, sorting them into A, B, C, and D hazards. When the risk of death or grievous injury is likely or very likely, a recall is

¹⁴⁵ CPSC press release #93-075, June 1, 1993.

¹⁴⁶ CPSC press release #74-070, October/November 1974.

¹⁴⁷ CPSC press release #92-028, December 11, 1991.

¹⁴⁸ CPSC press release #01-138, April 30, 2001.

classified as "A"; when the risk is possible but not likely to occur, it is classified as "B," and so on. Class A recalls warrant the highest level of CPSC attention.¹⁵⁰ The agency keeps this classification scheme a secret from the public. Why? The agency's fear, say current and former CPSC employees, is that the media would not consider B, C, and D hazards newsworthy. Given the agency's frequent complaints that the press rarely gives prominent play to *any* recall, this logic makes little sense. What does the agency have to lose? The more significant impediment, and one that regulators are loathe to articulate, is that manufacturers do not want the public to know when a recall has been rated Class A, the most serious hazard. "What would eventually happen is that industry would start fighting recalls and the CPSC would get fewer voluntary agreements to recall," said former CPSC lawyer Bob Adler.¹⁵¹ CPSC chairmen are hesitant to take any action that would *decrease* the number of recalls. Shifting agency resources away from enforcement activities that yield recalls of tea kettles that expel hot water from their spout to other areas, such as regulating companies that manufacture small electrical devices, may decrease the agency's overall number of recalls. But at that same time, such a change in priorities is likely to decrease product-related injuries and deaths.

Publicly rating recalls according to hazard-level presents another type of problem, one that occurs when the agency moves quickly to recall a product. Regulators are often working on the cusp of information, and sometimes that information is wrong. For example, what happens if CPSC rates a recall "B", and subsequently, many more people are injured or killed? Or what happens when a recall is treated as presenting the most serious level hazard, but in fact, the product is not dangerous? This was the case with spray adhesives, a product manufactured by 3-M and Borden, and recalled by CPSC in 1973 after a University of Oklahoma toxicologist presented the commissioners with data suggesting a causal relationship between exposure to the

¹⁴⁹ CPSC press release #98-120, June 3, 1998.

¹⁵⁰ "Recall Handbook," Consumer Product Safety Commission, May 1999, pp. 12-13.

adhesives and birth defects. In a press release, the agency warned women of child-bearing age who had been exposed to the sprays to consider delaying pregnancy if they were not yet pregnant, and if they were pregnant, to seek the advice of a genetic counselor.¹⁵² Soon after the announcement, former CPSC lawyer Bob Adler reported, two to three dozen pregnant women called the CPSC to find out what they should do. "I know for a fact that many of these women had abortions," said Adler, "because CPSC had recalled the products."¹⁵³ As it turned out, the agency was wrong about the sprays. Independent studies conducted by the Mayo Clinic, the Canadian government, and the U. S. Public Health Service concluded that the toxicologist's study had been seriously flawed; no one else could find a problem with the product. Five months after removing spray adhesives from the market, CPSC lifted the ban.¹⁵⁴ The agency's intention of nipping a hazard in the bud had backfired.

In addition to beefing up recall effectiveness, the agency needs to improve its identification of dangerous products. With more than two million companies manufacturing or selling consumer products in the U.S., it has been estimated that CPSC should receive at least 2,000 hazard self-reports each year.¹⁵⁵ In fact, the agency only receives about two hundred self-reports annually.

Attorney Michael Lemov argues that the wording of the CPSA is to blame for the low number of self-reports. In short, Section 15 of the Act requires manufacturers to report to the CPSC any "substantial product hazard ... that creates a substantial risk of injury to the public." "While some legal scholars may have a grasp of what these words mean," says Lemov, "it's not clear what 'substantial risk of injury' means to a busy executive attempting to both market a product and comply with safety laws."¹⁵⁶ It is

¹⁵¹ Adler interview.

¹⁵² CPSC press release #73-013, August 17, 1973.

¹⁵³ Adler interview with author, August 11, 1999.

¹⁵⁴ CPSC press release #74-002, January 25, 1974.

¹⁵⁵ Adler, Robert, p. 120.

¹⁵⁶ Lemov, Michael, "Product Liability," *The National Law Journal*, August 10, 1998, p. 2.

hard to fathom how busy the executives at Black & Decker must have been for them to conclude that reports from more than 1,000 customers of toaster fires did not constitute a “substantial product hazard.”¹⁵⁷ Children’s products manufacturer Cosco received 3,000 complaints of the locks failing on its strollers, including 250 reports of strollers unexpectedly collapsing, resulting in more than 200 injuries to babies, yet busy executives at this company also decided there was no need to report to CPSC.¹⁵⁸ Ann Brown stepped up CPSC’s enforcement of self-report violations, but the agency’s resource constraints will never allow it do more than scratch the surface. The solution: Congress needs to strengthen Section 15 of the CPSA with an amendment that eliminates the subjectivity surrounding a company’s obligation to report a product hazard.

In May 2000, First Lady Hillary Clinton and Chairman Ann Brown held a joint White House press conference to announce legislation aimed at cracking down on manufacturers that keep mum about known product hazards. The most significant aspect of the legislation: eliminating the current \$1.65 million cap on the maximum fine the CPSC can impose on companies like Black & Decker and Cosco.¹⁵⁹ If passed by Congress, such a provision would allow the CPSC to make it significantly more expensive for companies to break the self-report law.

Companies don’t decide to manufacture products in a vacuum. Most simply try to keep up with consumer demand. Our babies giggle and look happy when they slide across the kitchen floor in a walker, we need a well-equipped basement workshop to do our home repairs, and it’s fun to zip through the woods in an ATV. We trust our brands, and we trust that someone (we don’t know for sure who that someone is) is making sure our products are safe. In 1970, the National Commission on Product Safety deemed that

¹⁵⁷ *CPSC press release #00-043*, December 30, 1999.

¹⁵⁸ *CPSC press release #01-119*, April 4, 2001.

¹⁵⁹ *CPSC press release #00-108*, May 2, 2000.

“someone” to be the federal government, and Congress agreed. Yet thirty years later, the CPSC is a shadow of the agency Congress envisioned.

“The agency is a paper tiger, a watchdog that is ignoring its mandate,” said former commissioner Stuart Statler, reflecting on how far the commission has strayed from the National Commission on Product Safety’s 1970 recommendations. “The Clinton administration was not very encouraging of regulation, and the current (Bush) administration is still not. Today’s commissioners do not understand the original purpose of the law – to get product risks off the market quickly, and not wait and wait and wait to give manufacturers a second and third chance that often results in no action at all,” Statler lamented. “The original aim of the Consumer Product Safety Act has been lost in a morass of paperwork and obeisance to procedures that cause CPSC to bend over backwards to manufacturers. As a result, CPSC has been largely ineffective in ridding the market of dangerous products.”¹⁶⁰

Given the proliferation of products in our lives, it is now more important than ever for the CPSC to be able to carry out its mandate. Yet Congress resists giving the agency the budget it needs, presidents continue to appoint commissioners who put industry interests above those of consumers, regulators chase their tails pursuing the wrong numbers, and corporations keep their shareholders happy by creating newer, better, cheaper, and faster products, often with too little consideration of their possible risks. And a child like Danny Keysar doesn’t live long enough to blow out two candles on his birthday cake.

¹⁶⁰ Statler interview.