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CENTER FOR JUSTICE &  
DEMOCRACY  
**\*\*NEWS\*\***

Dear Friend,

If you're a civil justice fan in America, the 2008 elections were momentous.

For one thing, this country will now be losing perhaps the most anti-civil justice president in history, who discussed his anti-consumer views in hundreds of speeches, as well as virtually every State of the Union address, during his eight years in office. This newsletter takes a look at his civil justice legacy.

That said, there are still many challenges ahead, most significantly the economy. Among other damage to our country, the financial collapse may lead to a new hard insurance market within the next 6 months. Watch for the insurance industry to start blaming juries, lawyers and lawsuits for their own mismanagement and greed.

Indeed, there promises to be much work ahead for Center for Justice & Democracy!

Sincerely,

Joanne Doroshow  
Executive Director

## IN THIS ISSUE: CIVIL JUSTICE AND THE BUSH YEARS

When George W. Bush became governor of Texas in 1995, one of his first acts was to meet with representatives of nine corporate groups in a factory outside Austin, after which he declared a legislative "emergency" on "frivolous lawsuits." He went on to sign a series of bills – so called "tort reforms" – that made it more difficult or impossible for injured Texans to hold reckless corporations, malpracticing doctors and other wrongdoers accountable in civil court.

As president, Bush never stopped his assault on injured victims' rights. It seemed that nearly every day for the first several years of his Administration, he pushed the issue. From speeches before medical societies, like the January 16, 2003, remarks in Scranton, Pennsylvania where he said, "For the sake of affordable and accessible health care in America, we must have

a limit on what they call non-economic damages. And I propose a cap of \$250,000." To the campaign trail, like his October 7, 2004 remarks, "We got to do something about the frivolous and junk lawsuits here in America that hurt our employers and make it hard to get jobs." To his announced support for tort reform legislation in almost every State of the Union address. Bush never stopped denouncing injured victims and the lawyers who represent them.

Given the relentless White House attacks, some may wonder how it is that we still have a tort system left in this country.

Luckily, civil justice advocates successfully fought back on many levels. However, some tort restrictions did get through. It's time to take a closer look at some of the damage Bush did during his eight years in office.

### LEGISLATIVE FAILURES

Despite campaigning hard on an anti-Washington, states' rights platform, Bush came to the White House intent on bringing federal "tort reform" to the nation. Chief among his goals was passing federal legislation that would limit the liability of malpracticing doctors, hospitals, HMOs and nursing homes, as well as manufacturers of unsafe drugs and medical devices. Bush's plan included a \$250,000 cap on non-economic damages, which compensate injured patients for intangible but real injuries, like infertility, permanent dis-

ability, disfigurement, pain and suffering, loss of limb or other physical impairment. Such a limit disproportionately effects victims who don't have high wages – like women working inside the home, children, seniors and the poor, who are thus more likely to receive a greater percentage of their compensation in the form of non-economic damages if they are injured.

Under the leadership of then Senate Majority Leader Bill Frist, Bush-supported medical malpractice bills came to vote several times, each time resulting in stunning defeat. In no case had there been a single



hearing, mark up, committee debate or anything close to careful consideration. In fact, Frist bypassed the committee process entirely every time, introducing the bills with little notice before senators were asked to vote. And they lost each time.

Though Bush's crusade against medical malpractice victims and their families failed, he did sign into law a few "tort reform" bills that chipped away at legal rights. Among the more significant:

**FISA Amendments Act (2008).** Gives retroactive lawsuit immunity to telecom companies that, at the behest of the Bush administration, illegally monitored Americans' private emails, phone calls, password protected web activity and other communications for nearly six years after the September 11, 2001 attacks.

**Public Readiness and Emergency Preparedness Act (2005).** Affords drug makers total lawsuit immunity for death or injury caused by administration or use of vaccines when a public health emergency has been declared.

**Protection of Lawful Commerce in Arms Act (2005).** Strips away the legal rights of gun violence victims and their families, as well as cities and counties, to seek redress against reckless and negligent gun dealers, manufacturers, distributors and trade associations.

**Class Action Fairness Act (2005).** Forces most state law-based class action cases, including product liability, worker protection, consumer fraud and civil rights suits, into federal court, making litigation more costly, more time-consuming and less likely that victims get their rightful day in court.

**Support Anti-Terrorism by Fostering Effective Technologies Act (2002).** Shields sellers (*i.e.*, manufacturers, distributors and providers) of "qualified anti-terrorism technology" from most lawsuits if a terrorist attack occurs and their products or services fail.

"Qualified anti-terrorism technology," as designated by the Secretary of Homeland Security, can include detection systems, medical products and security services. Among the more troublesome provisions of the Act: Sellers can't be held liable for punitive damages, can't face any additional damages beyond their insurance coverage and can't be sued in state courts.

**Teacher Protection Act (2001).** Immunizes teachers from liability for hitting students when the teacher is trying to control, discipline, expel or suspend a student or maintain order or control in the classroom or school.

**Air Transportation Safety and System Stabilization Act Amendments (2001).** Restricts liability for claims arising from the September 11th terrorist-related plane crashes against an air carrier, aircraft manufacturer, airport sponsor or person with a property interest in the World Trade Center to the limits of their liability insurance coverage. Fortunately, through the efforts of civil justice advocates, Congress also passed the 9/11 Victim Compensation Fund to ensure 9/11 victims received some compensation.

**"TORT REFORM" VIA FEDERAL AGENCIES**

In the early years of the Bush Administration, the government began quietly putting administrative agencies into positions of power never before imagined, allowing them to simply wipe out or render meaningless the legal rights of anyone who has been hurt by the very dangerous products and practices that the agencies themselves failed to prevent. The effort began with filing briefs on behalf of corporations in personal injury actions. In later years, it turned into a full-scale attempt to use rulemaking to preempt state tort law.

As the *Wall Street Journal* reported on October 15, 2008, in the last four years the Bush administration has changed at least 50 federal agency rules for the pur-



pose of blocking safety lawsuits by ordinary Americans. Rules already in place cannot be easily undone; rather they must go through extensive review processes before they are changed, potentially making them "the ultimate Bush legacy for the business community." This stealth attack on victims' rights not only represents an unprecedented expansion of executive power – a hallmark of the Bush presidency – but also accomplishes exactly what the tobacco, insurance, pharmaceutical, chemical, oil and auto companies have been trying to achieve over the last three decades: Eliminating the ability of injured consumers to hold corporations legally and financially accountable for their actions.

Blocking product-safety lawsuits brought by state governments is another objective of such immunity provisions. According to *WSJ* reporter Alicia Mundy, "[M]any states sue drug manufacturers over Medicaid costs. Some states have paid millions of dollars for drugs that later turned out to be defective or dangerous. They want to recoup those costs from the manufacturers or they want to be able to at least to hit the manufacturers with the costs of paying for patients who are later injured or killed because that ultimately comes back on the state health services. Under preemption, states stop suing," explained Mundy, citing a recent case

brought by the state of Alaska against makers of the anti-psychotic drug Zyprexa. "They basically settled for \$15 million, which is chump-change compared to what the suit was for," said Mundy, "because they are very worried that preemption will come to pass this year or next and they will have no grounds to recover any money at all."

The following examples are representative of the federal rules rewritten under Bush that attempt to preempt state tort law, although their legality remains to be seen:

**Drug labeling.** Consumers injured or killed by a defective or dangerous drug can't sue the manufacturer if the medication label has been approved by the Food and Drug Administration.

**Mattress flammability.** Consumers injured or killed in a mattress-related fire can't sue the manufacturer if it complied with the Consumer Product Safety Commission's mattress-flammability standard.

**Railroad safety.** Anyone injured or killed by a rail car carrying hazardous materials catching fire can't sue the manufacturer if the rail car met the federal construction standard.

**Seatbelts.** Passengers injured or killed because they had no seatbelt can't sue the carmaker if it installed the number of seatbelts mandated by the National Highway Traffic Safety Administration.

The U.S. Supreme Court is now examining the validity of some of these rule changes, and if upheld, it could be up to Congress to reverse them.

**TRANSFORMING AGENCY MISSION AND MANAGEMENT**

The Bush administration has radically changed the mission of federal agencies from safeguarding citizens to safeguarding corporations. By tapping industry insiders to head federal health and safety agencies, the White House has

allowed such agencies to be captured by the very industries they are supposed to regulate, led by a revolving door of industry loyalists, who have undermined, and at times eliminated, critical health and safety protections.

Anti-consumer appointments include:

**Susan Dudley**, director of the Mercatus Center, an industry-funded, anti-regulatory advocacy organization, before heading the White House-controlled Office of Information and Regulatory Affairs (OIRA), the regulatory arm of the Office of Management and Budget (OMB). According to Public Citizen, while at Mercatus, Dudley attacked proposed regulations and orchestrated campaigns to strike down existing environmental, health and safety safeguards, including: the Environmental Protection Agency's efforts to keep arsenic out of drinking water and lower levels of disease-causing smog; the National Highway Traffic Safety Administration's life-saving air bag regulations; and the Department of Transportation's rules to keep sleep-deprived truck drivers off the roads.

**Edwin Foulke**, partner at the union-busting law firm Jackson Lewis before being appointed to head the Occupational Safety and Health Administration (OSHA). While there, according to the *New York Times* and OMB Watch, he headed the firm's OSHA compliance practice, defending companies accused of health and safety violations; opposed several workplace safety regulations, including the OSHA ergonomics standard promulgated during the Clinton administration; advocated voluntary compliance standards over mandates before the Senate; and testified several times before Congress on behalf of the U.S. Chamber of Commerce, the nation's largest business trade association. As OSHA chief, Foulke pushed a voluntary compliance agenda, ignored scientific evidence linking diacetyl to "popcorn worker's lung" and blamed many job-related injuries on worker carelessness, according to the *New York Times*. In a November 7,



2008 farewell letter to OSHA staff, Foulke said he was taking a job at Fisher & Phillips, a law firm that not only represents employers during safety and health inspections and in enforcement actions brought by OSHA but also defends employers from whistleblower claims investigated by OSHA.

**David Lauriski** spent 30 years in the mining industry advocating looser coal dust standards before being named head of the Mine Safety and Health Administration. According to the Revolving Door Working Group, the



90 Broad Street  
Suite 401 New York, NY 10004  
Phone: 212.267.2801  
Fax: 212.459.0919  
E-mail: [centerjd@centerjd.org](mailto:centerjd@centerjd.org)  
Web: <http://centerjd.org>

**IMPACT**

Editor:  
**Daniel Albanese**

Contributor:  
**Emily Gottlieb**

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*New York Times* and Jack Spadaro, former head of the National Mine Health and Safety Academy, a branch of the Department of Labor, during his tenure, Lauriski rejected a safety proposal targeting surface hauling, which was known to cause 30 percent of fatal, above-ground mine accidents; instituted a “compliance assistance” program that encouraged inspectors not to write up violations when operators failed to comply with the law; and attempted to institute new coal regulations that put miners at greater risk of black-lung disease. He left the agency in 2004 and took a position at a mine-industry consulting company.

In addition to installing industry loyalists in key agency management positions, the Bush administration has tried to weaken the agencies responsible for enforcing health and safety standards. As documented in the CJ&D White Paper, *Corporate Empowerment and the Decline of Public Safety*, under Bush, the Consumer Product Safety Commission, the Occupational Safety and Health Administration, the National Highway Transportation Safety Administration, the Food and Drug Administration and the Environmental Protection Agency have been plagued by budget woes, staffing problems and regulatory inaction, having detrimental, long-term effects not only on the efficacy of federal agencies but also on the nation’s collective wellbeing.

To make matters worse, in January 2007, President Bush quietly amended a key executive order giving his administration, and by extension private industry, more power over agencies that enforce health, safety and environmen-

I'll deliver these straight to the United States, sir.



tal protections. This new directive, Executive Order (E.O.) 13422, shifts regulatory power away from federal agencies – power Congress directly delegates to agencies through legislative enactments – and centralizes it in the White House-controlled Office of Information and Regulatory Affairs. Under E.O. 13422, federal agencies cannot develop, promulgate or enforce regulations that involve anything from warning labels on medicines to safety standards for construction worksites to environmental protections that keep cancer-causing chemicals out of the air and water unless they obtain explicit approval from the White House.

**LOOKING FORWARD: HOPE FOR A SAFER AND FAIRER AMERICA?**

The Bush presidency has left Americans in a country with more risks and fewer protections. Will President-elect Barack Obama undo the damage that’s been done and work to protect victims’ rights? We believe the answer is yes.

Already, indications from Obama’s transition efforts suggest that he plans to strengthen federal regulations in the consumer, environmental, and workplace areas. And despite his support of the so-called Class Action Fairness Act and a few other

anti-consumer bills early in his U.S. Senate career, Obama’s record speaks to a belief in justice and corporate accountability. For example,

- During the presidential campaign Obama said he intended to roll back the Bush administration’s push for FDA preemption.
- In 2008, he voted for an amendment to strike retroactive immunity for telecom companies that aided Bush’s illegal wiretapping program (although eventually supporting the bill).
- In 2005, he voted against legislation that eliminates the ability of gun violence victims to seek compensation from reckless and negligent gun dealers, manufacturers, distributors and trade associations.
- In 2005, he voted against legislation that left malpracticing hospitals, HMOs, nursing homes, doctors and pharmaceutical companies off the hook for injuring patients.
- He’s in favor of removing the current \$300,000 cap on compensatory damages and punitive damages for violations of Title VII and the Americans With Disabilities Act.
- He’s in favor of the Lilly Ledbetter Fair Pay Act, which begins a new 180-day statute of limitations for filing an equal-pay lawsuit with every paycheck affected by a discriminatory pay decision.
- He co-sponsored the Servicemembers Access to Justice Act of 2008 (S.3432), which protects military service members against being forced into arbitration in disputes with their employers.

Another good sign: “Tort reformers” appear extremely worried about an Obama administration.

For the sake of the health and safety of all Americans, we hope our prediction is correct.

