

Good morning, Mr. Chairman and Members of the Committee. My name is Mary Sheila Gall and I am honored to appear before you today as President George W. Bush's nominee for Chairman of the Consumer Product Safety Commission.

I have served as a Commissioner of the CPSC since December 1991. I was renominated to a second seven-year term by President Clinton in 1998, and confirmed by the Senate in 1999. As a result of my nearly ten years of active service at the Commission, I am thoroughly aware of its statutory responsibilities and procedures, its day-to-day operations and the regulatory, enforcement and other issues that Commissioners and the Chairman must confront. Prior to my service with the Commission, I served as an assistant secretary in the Department of Health and Human Services, where I oversaw 55 federal programs, a staff of approximately 1,000 employees and an annual budget of five billion dollars. I also worked in the White House and for a number of Members of Congress. These almost thirty years of public service in both the legislative and executive branches of government help me to understand the Commission's functions and how it interacts with Congress, the regulated community and the other stakeholders who have an interest in the Commission's mission and operations.

For Senators who are new members of the Committee, let me provide some background. The mission of the Commission is to protect consumers from unreasonable risk of death and injury associated with the approximately 15,000 types of products within its jurisdiction. The Commission's major programs are designed to (1) identify and analyze product hazards, (2) assist industry in developing voluntary product safety standards, (3) monitor compliance with voluntary standards, (4) issue and enforce mandatory product safety standards, (5) obtain recalls of dangerous products (6) penalize companies that violate the law and the Commission's regulations, and (7) inform and educate the public about potential product risks.

To carry out this mission, the Commission employs approximately 480 FTE's, about two-thirds in the Commission's Bethesda, Maryland headquarters and Gaithersburg, Maryland laboratory, and about one-third in its field offices. The Commission's budget for fiscal year 2001 is 52.4 million dollars and the request to Congress for fiscal year 2002 is 54.2 million dollars.

The Commission is authorized to have five Commissioners but has been operating with three since the mid-1980's. The Consumer Product Safety Act requires an explicit partisan division among the Commissioners. Thus when Congress created the Commission it not only provided that regulatory decisions should be made by a collegial body, and not be a single official, but that that collegial body itself should have members of different political philosophies. If only one point of view was expressed a large segment of the public would never have their views heard. The Commissioners are available to critique one another's reasoning, and this leads to better and more informed decisions.

The rest of this statement is divided into two parts. The first will address the challenges that I see lying ahead for the Commission, and how I believe that the Commission can meet them. In the second, I address certain aspects of my record as a Commissioner. I am aware that there is some opposition to my nomination. I intend to address the issues that I have heard raised and to state why I took the positions that I did. I think when you read the entire record that was before the Commission, even people who continue to disagree with me will understand the basis for my actions.

## **COMMISSION ACCOMPLISHMENTS AND CHALLENGES**

The Consumer Product Safety Commission is a strong and effective organization, one that gives the American taxpayer great value for the resources devoted to it. The Commission has grown stronger during the tenure of the two Chairmen with whom I have been privileged to serve. Chairman Jones-Smith oversaw the move of the Commission to its new headquarters in Bethesda, and worked with Congress to reauthorize the Commission. Chairman Brown has raised the visibility of the Commission considerably during her tenure and has proven very effective in disseminating the Commission's safety message, particularly in the area of product recalls. The Commission has accomplished a great deal, especially in improving the safety of children's products. I intend to build upon this record of success, to be an effective steward of the mission of the Commission and of the public monies entrusted to it, and to enhance the efficiency of the Commission's operations.

### Imports and Exports of Consumer Products

There are three areas of Commission operations that I intend to emphasize if I am confirmed as Chairman. The first lies in the area of imported and exported consumer products. When the Commission began its work in 1973, relatively few of the products over which it had jurisdiction were imported. Today that situation has changed dramatically. Moreover, U.S. manufacturers have increased significantly their own export markets for consumer products. The large growth in imports and exports means that the Commission needs to be more active in protecting consumers from defective products while at the same time facilitating the obvious benefits of imports and exports.

### *Consumer Product Safety Standards Harmonization*

There are two ways in which the Commission can improve the safety of imported and exported consumer products. First, Commission technical staff should participate more in the effort to harmonize international product safety standards through U.S. representative bodies to international voluntary standards-setting organizations. It can also take advantage of the existing activity of U.S. government organizations such as the National Institutes of Standards and Technology, the International Trade Administration, and the Technology Administration within the Department of Commerce. Commission staff participation will give voluntary standards-

setting organizations the benefit of both the technical expertise of Commission staff and its commitment to product safety.

Product standards harmonization should never be an excuse to *lower* the level of protection available to American consumers. International consensus is not a justification for permitting the importation of products that pose an unreasonable risk of death or injury to American consumers. I am, however, confident that the excellence of both the U.S. standards-setting process, and of the standards that it produces, are apparent in the international arena, and that the effort to harmonize international product safety standards is worth the support and encouragement of the Commission.

### *Communicating with Importers*

The second area through which the Commission can improve the safety of imports is to communicate its safety message and requirements to industries and governments in other countries that export to the United States. The Commission already makes such efforts. Commission laws and regulations are available to anyone with access to the Internet through the Commission's web site. Commission representatives travel regularly to the People's Republic of China, to inform its industry and government representatives about Commission regulations, emphasizing products such as fireworks, toys, and cigarette lighters. We need to continue this effort and to disseminate the Commission's message to countries that may be exporting consumer products to the U.S. for the first time. The Commission should focus more on imports arriving from Mexico. The value of imports into the U.S. from Mexico more than doubled between 1994 (\$49.5 billion) and 2000 (\$136 billion). Given that dramatic increase in the volume of trade, the Commission needs to ensure that consumer products imported from Mexico meet U.S. safety standards. The Commission also needs to strengthen ties with Mexican government and private organizations that create, enforce, and monitor consumer product safety standards.

The Commission's resources available to carry out this effort are limited while the resource requirements of disseminating information internationally are immense. In order to get the Commission's message out within its resource limitations, we need to leverage the resources of other government agencies through strategic alliances to better inform foreign governments, industries, and trade associations of Commission regulations and activities.

### Getting the Commission's Message Out

Another area that I believe can be improved is the Commission's communications with the public. The present Chairman has done a very good job in publicizing the Commission's product recalls through television appearances. The Commission will continue to use this important mass media outlet to reach members of the public. The Commission also has ongoing a pilot project with industry to see if the return rates of product registration cards can be improved. This pilot project needs to be completed, and the Commission needs to assess all

other ways in which companies with product recalls and the Commission itself can expeditiously and efficiently inform consumers.

Beyond notice of product recalls is the Commission's more general information and education effort. The Commission has improved its effectiveness in this arena, through such activities as baby safety showers, many of which are carried out in cooperation with congressional field offices. Another successful information and education effort has been "Recall Roundup," an annual Commission project to inform the public about previously-announced recalls, where the Commission has reason to believe that unreturned and still dangerous products remain in the hands of consumers. Yet another successful campaign of information and education has been an inter-agency effort known as "Back to Sleep." This program tells new parents and other caregivers to place newborn infants on their backs to sleep. Various studies have shown that placing young infants in this position reduces the incidence of deaths associated with Sudden Infant Death Syndrome (SIDS), some cases of which may be related to suffocation in a face down sleeping position. Since the advent of the "Back to Sleep" campaign, the SIDS rate in the U.S. has decreased by about 46% since 1992, saving the lives of more than 2,600 babies every year. All of these efforts should be continued and reinvented when necessary.

The Commission needs to do more to get its message out to populations that have limited access to important consumer safety information. Efforts to reach minority and low-income populations will require all of the Commission's ingenuity and creativity. I intend to leverage Commission resources by working with community groups, plus state and local governmental entities and other federal agencies. The Commission needs to pay particular attention to our elderly citizens. America's elderly are particularly vulnerable to product safety hazards involving fires and falls. They are more likely to have older products that do not meet present safety standards, possibly even products that have been recalled by the Commission. Older Americans, especially the elderly over 85, represent the fastest growing segment of the U.S. population. The Commission needs to enhance its present information and education efforts that reach the elderly and initiate new efforts to reach them even more effectively. The National Fire Protection Association and the Centers for Disease Control have a program designed to reduce the incidences of fires and falls among our senior citizens. The Commission provided much of the information used by that campaign, and should remain involved in it, as well using other innovative means to make sure that America's elderly citizens have the most up-to-date and useful information to enhance their safety.

#### Resource Challenges and Better Operations

The Commission will be facing a number of resource challenges in the next few years. These challenges must be met if the Commission is to continue its life-saving mission activities, while at the same time complying with the other mandates that Congress has given to it.

### *Public Access to Government Materials*

Recent legislation requires Federal agencies to improve public access to government materials. Virtually all of the agency records and reports that are publicly available at the Commission will need to be made available in an electronic format so that the public can gain access through and view them over the Internet. At the same time, sensitive Commission materials, such as cases under investigation by the Compliance staff, must not be disclosed. State of the art “firewall” computer software will have to be maintained and continually upgraded.

There are other new government-wide mandates that have substantial resource implications for the Commission. The Government Paperwork Elimination Act requires that much of what we do presently through paper must be done electronically. Fulfilling this requirement will require virtually universal use of electronic signatures. The mandate known as “Section 508” requires that all of the equipment that the Commission acquires be usable by persons with disabilities. Information made available to the public must also be made available for persons with disabilities. At this time, we have no specific dollar estimate of the costs of compliance with these requirements, but it is likely to be significant.

### *Telecommuting*

Congress has also passed legislation requiring federal agencies to adopt telecommuting programs that will cover an agency’s entire workforce by April 2004. We are developing a pilot telecommuting program for Commission headquarters staff. The Commission has substantial telecommuting experience already from its implementation of a telecommuting program in the field. Our program in the field saved money, because the Commission was able to close a number of small field offices and reduce the sizes of others. We achieved savings overall, but the implementation of the telecommuting program required a substantial investment in new equipment. A telecommuting program for headquarters staff will be different, because it will be a part-time program, enabling employees to work from their homes at least one day a week. The Commission must maintain office space for employees and computer stations will need to be upgraded and modernized so that the employee can work effectively from both home and office. Telecommuting at headquarters will result *not* in budget savings but rather in increased outlays.

### *Laboratory Modernization*

The General Services Administration (GSA) is studying the existing Commission laboratory facilities and operations in Gaithersburg, Maryland. We expect GSA to recommend that the Commission undertake a five-year redevelopment plan to enable the lab to continue to support the Commission’s operations. Without this redevelopment, lab operations will suffer. These operations are housed in facilities that were designed originally to support a Nike missile-

tracking radar site from the early 1950's, not a modern laboratory. The FY 2002 Budget Request does not contain funding for this redevelopment plan.

Without additional funds to invest, all of the requirements described above would eventually have to be satisfied by reductions in the Commission's operations. We will be unable to sustain our effort to integrate the Commission's hazard databases, to continue to modernize our information technology system, to maintain a replacement cycle for computers, or even to sustain our present level of activity. I intend to work aggressively to secure the funding for these critical investments and activities.

### *Better Operations*

The Commission, like any organization, is dependent for its success on very important people who work behind the scenes. Since the Commission is a data-driven agency, its ability to collect, analyze and disseminate data is crucial to its effectiveness. At the present time, the Commission maintains five databases: epidemiology, consumer complaint, news articles, and compliance, which has separate databases for its regulated products and for its other recalls. A Commission employee, trying to locate all of the Commission's death and injury information about a particular product, must search all of these databases. Moreover, some of this search must be through paper documents. We want to integrate our databases and to convert paper documents into electronic format. The Commission has made progress in this project, but it has been hobbled by resource limitations. Similarly, resource limitations have prevented the Commission from implementing a regular program of replacing and improving information technology equipment.

In addition to problems caused by lack of resources in the area of information technology, the Commission has not had a research budget. If the Commission had a research budget, it could contract out for research into significant consumer product safety problems that require substantial resources to understand and to evaluate. For example, residential electrical distribution systems (e.g., circuit breakers, panel boards and wiring) were implicated in an estimated 38,000 fires, resulting in 280 deaths and \$680 million in property damage in 1998. One project that the Commission has considered is conducting long-term testing and evaluation of the performance of circuit breakers and panel boards to determine if the safety standard for these products should be upgraded. It is true that industry performs research, but most of it is for product development, rather than to evaluate the overall safety of classes of products and the adequacy of voluntary safety standards. The research contemplated by the Commission will spur research and innovation by manufacturers. But the preliminary work must often be done by a government agency, which is why most other federal health and safety agencies have a separate research budget. As Chairman, I intend to work to secure the resources so that the Commission can integrate databases, meet its information technology needs, and undertake research projects.

## **RECORD**

I have been a Commissioner since 1991. In that time I have cast almost 700 votes. I have, in addition, made a number of public statements, both in connection with those votes and in other contexts. Given that number of votes and public statements, I am bound to have taken positions on specific issues with which some people may disagree. I urge you to consider my record in its entirety, and not just one, or even several, votes on issues on which you find that you reach a different result.

### Voting Record

My voting record at the Commission shows that I do not hesitate to support recalls when products are dangerous, and to impose penalties when businesses have violated Commission regulations. On questions of enforcement, such as recalls, subpoenas and civil and criminal penalties, I voted approximately 97% of the time with the majority. My only disagreements were four votes: the amount of two civil penalty settlements; the timing of the issuance of a subpoena and special order; and the timing of the filing of an administrative complaint. I have *always* supported staff recommendations that an administrative complaint be filed seeking to have a product recalled. Similarly, I have *always* supported civil penalty and referrals to the Department of Justice to seek civil or criminal penalties.

My voting record on regulatory matters does not differ a great deal from my record on enforcement matters. I have voted with the majority in approximately 93% of the votes that I have taken. There have been several votes I have cast against proceeding with regulation that have been criticized. I will address those votes and opinions below.

### Baby Bath Seats

The controversy surrounding baby bath seats is perhaps the best example of where I believe my opponents' criticism is misguided. Baby bath seats and rings are products designed to facilitate the bathing of a slippery, squirmy infant. They entered the U.S. market in the early 1980s. Unfortunately, some caregivers left infants placed in such bath seats or rings unattended in tubs of water, with the tragic result that the infants drowned. In some cases, the infant ended up in the water because the bath seat overturned when the suction cups failed.

In 1994, the Commission staff presented the Commission with a series of options, including an outright ban of the product. The staff recommended that the Commission issue an Advanced Notice of Proposed Rulemaking. Most of the discussion at that time centered on an outright ban of the product.

I joined my colleague, Commissioner Jacquelyn Jones-Smith and voted against rulemaking. Commissioner Jones-Smith and I did instruct the staff to begin an information and education campaign to alert consumers about the hazards of leaving infants unattended in tubs,

with or without a bath seat. I voted against beginning rulemaking at that time because my review of the in-depth investigations showed me that the presence of this product had nothing to do with the reasons that persons left infants unattended. The “theory” of the proponents of banning baby bath seats is that people are more likely to leave infants unattended in bath seats than they are without a bath seat. This theory had as its basis statements by persons who had left infants unattended in tubs with a bath seat. They said that they had left the child only for “an instant” or for “a short time.” When I read the in-depth investigations of these drowning incidents, however, which included police, medical examiner, emergency room, social worker and paramedic interview reports, they revealed that these caregivers had often left the victims unattended for extended periods, sometimes for over an hour. In one case, a baby sitter placed an infant in a bath seat in a stationary tub in the laundry room and left the room. The baby sitter admitted that she knew that the baby could turn the water faucets on. The baby did turn on the hot water and died of thermal burns over 85% of his body when hot water filled the tub. The baby sitter forgot about the baby in the tub until water flowed through several rooms before reaching the room in which the baby sitter was located. I simply could not find that the bath seat was in any way defective or determinative of why caregivers left infants unattended.

In 2000, the Commission received a petition to ban baby bath seats. My review of the in-depth investigations showed the same pattern of infants left unattended in tubs for the same reasons, unrelated to the presence or absence of a bath seat. It is notable that my colleague, Chairman Ann Brown, who had voted to begin rulemaking in 1994 and who had generally favored a ban on the product, changed her position and said that a ban was not justified.

The evidence before the Commission, however, revealed developments in the use of bath seats that caused me to reconsider the position that I had taken in 1994. The new data showed that infants were tipping over in bath seats and sliding through the leg openings *even in the presence of caregivers*. It also showed that bathtubs increasingly are being made of non-slip resistant material to which suction cups do not adhere. Finally, although progress had been made in developing a voluntary standard, it still did not deal with the issue of infants sliding through the seats, and its only attempt to address the problem of non-skid bathtub surfaces was an inadequate labeling requirement on the packaging. As a result of these new developments, in May 2001, I joined my colleagues and voted to begin a rulemaking that has as its objective the development of a performance standard for baby bath seats.

What conclusions should the Members of this Subcommittee draw from the bath seat example about my regulatory philosophy? As a regulator my task is to assess whether or not the *product* was defective, and whether it poses a substantial risk of injury to the public, the statutory criteria upon which the Commission is empowered to take action.

In 1994, I found that the record would not support a ban, because the evidence before the Commission failed to show any characteristic of bath seats that induced caregivers to leave infants unattended more frequently or for longer periods than they did in the absence of a bath seat. In 2001, the evidence available to the Commission changed. The record still failed to

show that the presence of a bath seat induced caregivers to leave more frequently or to stay away longer, but it did show that bath seats tipped over or children slid through leg hole openings in the presence of caregivers. Moreover, the Commission staff, which had not proposed any ideas for a performance standard in 1994, had several ideas about improving the stability/retention of bath seats and minimizing the hazard of infants becoming entrapped by sliding through the leg hole openings. I was, therefore, persuaded that beginning rulemaking was justified.

### Baby Walkers

In 1994, the Commission was petitioned to ban the sale of baby walkers. The Commission staff recommended that the Commission begin formal rulemaking to develop mandatory performance standards for baby walkers. I voted against rulemaking in this case for two reasons. First, the record showed that just as many babies fell down stairs who were not in walkers as fell down stairs who were in walkers. This fact suggested to me that the real problem was an open staircase. The simple act of closing a door or using a safety gate would protect babies in or out of walkers. Second, I thought that any changes needed in the product could best be addressed through the voluntary standards setting process. The Commission staff and industry worked together to develop voluntary standards that prevent babies in walkers from going down stairs. These standards appear to be adequate and compliance with them appears substantial.

### Bunk Beds

The question of whether and how to regulate bunk beds posed a different issue. In the cases of baby bath seats and baby walkers, the product contemplated some level of caregiver involvement and supervision. One should never leave an infant alone in a tub of water and one should always block access to hazards such as stairs that might threaten a child in or out of a baby walker. Bunk beds, however, contemplate that the caregiver *will* leave the child unattended while the child sleeps. Thus, the design and construction of the bunk bed must give the child a safe place in which to sleep, separate and apart from the actions of the caregiver. Some bunk beds had guard rails or end pieces with spacing that resulted in fatal entrapments of children.

The bunk bed industry was aware of this problem and first adopted safety guidelines in 1978. By the time that the Commission considered its mandatory rule, the industry voluntary standard had virtually eliminated the entrapment hazard and differed from the mandatory rule in only minor technical points. In my experience as a Commissioner, I have found few voluntary standards groups that have been as responsive to the Commission's concerns as the bunk bed industry.

Both the Consumer Product Safety Act and the Federal Hazardous Substances Act require that the Commission not promulgate regulations if an existing voluntary standard

eliminates or adequately reduces the risk of injury, and it is likely that there will be substantial compliance with the voluntary standard. In the case of bunk beds, the voluntary standard had been effective and had been under constant revision to make it even more effective. Moreover, compliance with the voluntary standard in the seven years preceding adoption of the Commission of the mandatory standard had been in excess of 90%, and may have been 100% at the time that the Commission adopted the rule. It was my view that the statutory criteria were more than fulfilled by the record before the Commission, and I voted, therefore, not to adopt the mandatory standard. By the time that I voted, the bunk bed industry, threatened by inconsistent state legislation mandating bunk bed specifications, had changed its position and actually favored a *mandatory* standard. Since the time that the mandatory standard has gone into effect the Commission staff negotiated the recall of 200 bunk beds in October 2000 as a result of a collapsing hazard covered by the voluntary, but not the mandatory, standard. There will be an intensive program in the field to search for non-conforming bunk beds in the fall of this year.

The basis of my decision against a mandatory standard for bunk beds was very different from the basis of the decision in baby bath seats and baby walkers. I did not vote against a mandatory standard because the product could be used safely with reasonable caregiver attention, or even with reasonably foreseeable misuse. I did not cite caregiver neglect as a basis for opposing regulation, even though the record showed that most of the bunk bed fatalities occurred when infants were placed on bunk beds, a clear misuse of the product that is warned against. Rather, I rejected a mandatory standard because the statutes under which the Commission operates require that it defer to the voluntary standard under these circumstances. Congress made the voluntary versus mandatory standards policy call when it amended the Commission's statutes in 1981 and the Commission must adhere to this Congressional direction.

### Crib Slats

The Commission has had crib spacing regulations in effect since 1973 and they have helped to reduce significantly the number of fatalities associated with entrapments in cribs. The Commission's mandatory standard does not include criteria for structural or mechanical integrity of cribs. There is, however, an ASTM voluntary standard governing crib integrity, which was first published in 1989 as a result of a Commission staff request. The Juvenile Products Manufacturers Association (JPMA) has a third party certification program in place for cribs.

Between January 1985 and September 1996 the Commission became aware of incidents in which the crib slats disengaged from the side rails. Once the slats came loose from the side rails, they were free to move, which could create an entrapment hazard. The Commission staff asked that the ASTM subcommittee consider adopting a Canadian standard that required crib slats to withstand a certain amount of torquing (twisting) force.

Manufacturers were concerned that the Canadian standard would not detect the type of problem that caused crib slats to separate from crib rails. Eventually the Commission staff

agreed, and proposed an amendment to the voluntary standard different from the Canadian standard. I voted against publishing an Advance Notice of Proposed Rulemaking. I did so because I believed that the Commission had not given the voluntary standards setting process sufficient time to test and to comment on the standard that the staff was then proposing. For most of the time that the voluntary standards subcommittee had been considering the issue, the Commission staff had been advocating the use of the Canadian standard that the staff itself eventually conceded was inadequate. At the time that the Commission was asked to vote on the ANPR, the Commission staff-proposed standard, which was much different than what the staff had recommended previously, had been before the voluntary standards subcommittee only about two and a half months. The subcommittee chairman had committed to considering the standard as early as the very next month. Manufacturers needed time to test and evaluate the staff-proposed voluntary standard. Under the circumstances I believed that it was *premature* for the Commission to begin rulemaking while the voluntary standards setting process appeared to be actively considering and in the process of adopting a standard. I did note in my statement that there was a definite problem with crib slats, and that mandatory rulemaking remained an option if sufficient progress was not made on the voluntary standard. The ASTM subcommittee did adopt a voluntary standard that the Commission staff found acceptable and which became effective in March 2000. The Commission staff is presently monitoring the extent of compliance with the voluntary standard in order to determine whether it can recommend the withdrawal of the ANPR.

In both my decisions on bunk beds and on crib slat retention, the issue of deferral to voluntary standards was crucial. A preference for voluntary standards is not just my own personal decision as a Commissioner. Rather the Commission's own governing statutes *require* deferral to a voluntary standard whenever compliance with the voluntary standard would eliminate or adequately reduce the risk of injury addressed by the voluntary standard, and it is likely that there will be substantial compliance with the voluntary standard. Congress has itself adopted voluntary standards when it has chosen to legislate product safety standards. For example, in 1994, Congress adopted as interim bicycle helmet mandatory standards the following voluntary standards: American National Standards Institute Standard Z90.4-1984, Snell Memorial Foundation Standard B-90, or ASTM Standard F 1447. Thus, Congress itself has recognized the advantages of voluntary standards when it has acted in the area of product safety.

Nor is the statutory preference for voluntary standards irrational. Voluntary standards are easier to adopt and to amend when flaws are detected, when new designs emerge, or when changing patterns of consumer use reveal new hazards. It is true that mandatory standards do have enforcement advantages. But it would be a mistake to regard "regulated" as a synonym for "safe." Some products that the Commission regulates have violation rates that are surprisingly high. For example approximately 33%-40% of imported fireworks violate some aspect of Commission regulations, and 25% of imported fireworks are sufficiently violative so as to be actionable. Since 1998, the Commission has had 48 separate recalls involving 189 models of cigarette lighters that violated Commission regulations. In fiscal year 2001 alone, the

Commission staff found over 14 million non-conforming units. So the existence of federal mandatory regulations does not mean that products always comply with the regulations.

### Choking Hazards

In 1979, the Commission issued a small parts regulation under the authority of the Federal Hazardous Substances Act to ban certain toys and other articles intended for use by children under three because they posed a choking hazard if aspirated. In 1992, the Commission staff recommended: (1) mandatory labels for balloons warning of choking hazards in children up to age eight; (2) mandatory labels for marbles warning of choking hazards and reminding children not to put them in their mouths; (3) a ban of small balls less than 1.68 inches in diameter marketed for children under three, and a mandatory warning label on all games and toys with balls less than 1.68 inches in diameter.

I voted with my colleagues not to proceed with rulemaking along the lines recommended by the staff. I found that the statutory requirement that there be an unreasonable risk of injury was not present, and further found that the proposed regulations would do little or nothing to alleviate the risk that did exist. In the case of balloons, the risk of injury or death was low to begin with, there existed an ASTM voluntary standard for warning labels for balloons, and even the proposed mandatory regulation would apply only to about two-thirds of the balloons sold in the U.S. Upon my motion, the Commission did instruct the staff to cooperate with ASTM to improve the voluntary standard.

In the case of marbles, the risk of injury or death was again low and the mandatory standard would have applied only to about 30% of the marbles sold in the U.S. (marbles sold for industrial or collector purposes would have been exempt). Although there was no voluntary standard for labeling, a number of manufacturers did provide warnings about the well-known hazard of very young children putting marbles in their mouths. The situation was similar in the case of small balls and small parts in toys and games for children aged three and four years: low risk of injury or death, coupled with widespread consumer knowledge of the hazards of letting children under three play with items that can potentially choke them.

Industry had opposed the proposed regulations in its submissions to the Commission. In the aftermath of the Commission's decision not to proceed with regulation, the State Legislature of Connecticut passed a toy labeling law and other state legislatures began considering similar legislation. Industry attempted to have the Connecticut law struck down as an unconstitutional infringement on Congress's power to regulate interstate commerce. When court decisions upheld the Connecticut law, however, industry changed its position and asked for congressional intervention to prevent inconsistent state laws from requiring different labels.

Congress subsequently passed the Child Safety Protection Act, which codified many of the staff recommended labels. Congress is, of course, free to make this policy call and need develop no record further than a majority of the House and Senate. Congress, for example,

exempted products manufactured outside of the U.S. from the labeling requirements if the products were shipped directly to a consumer and if “accompanying material shipped with the product” contained the warning. I accept that Congress can choose to act even when the record before the Commission is insufficient to support rulemaking, and I have supported enforcement actions under the authority of the new law.

### “Nanny State”

Questions have been raised about a statement that I made in a letter to the editor that appeared in the October 12, 1999 issue of *USA Today*, in which I referred to certain Commission activities as “proclamations issued by this agency on behalf of the federal Nanny State.” My statement was in connection with a Commission press release about the practice of “co-sleeping.” (“Co-sleeping refers to adults and infants sleeping together.) I characterized the press release as a proclamation on behalf of the federal Nanny State because its basis was not a product over which the Commission has jurisdiction, but rather a cultural practice. It is entirely appropriate for the Commission to warn the public about defective products, but warnings about cultural practices are not within its purview. The press release in question also warns about the practice of placing infants in adult beds, which presents the genuine product hazard of entrapment between the mattress and the wall, and to the dangers of infants sleeping on soft bedding. These additional *product* warnings were inserted at my insistence.

My statement referred to a procession of proclamations. In addition to the press release on co-sleeping, I have been critical of Commission press releases that warn against obvious hazards, such as falling off snowboards. Finally, the Commission’s General Counsel stated to the *Washington Post* in May 1994 that the movie industry might be within the Commission’s jurisdiction if movies depicted unsafe practices with consumer products, such as stunts by children riding all-terrain vehicles. It was press releases or statements such as these, which seek to lecture people about either practices (co-sleeping) or products (movies) over which the Commission has no jurisdiction, or which lecture people about obvious hazards, such as falling down while moving forward, that prompted my remark about the federal Nanny State.

### Threshold for Commission Action

I have been asked whether I have a higher “threshold” or “burden of proof” for Commission action than other commissioners. My answer is that all Commissioners must adhere to the statutory requirements, either for enforcement or regulatory actions. To order a recall, the Commission must find that there is a substantial product hazard or that a product is a misbranded or a banned hazardous substance. To issue regulations, the Commission is bound by detailed procedural regulations set forth in its governing statutes, and by findings that it must make in order to justify the regulations. These statutes are binding on all Commissioners and upon the Commission staff. Persons who do not believe that the statutes have been followed may seek judicial review of Commission decisions and actions.

Perhaps what prompted the questions about my “threshold” or “burden of proof” for enforcement and regulation is my practice of asking detailed questions at staff briefings about the cases that are being relied upon to support staff recommendations to go forward with regulation. These questions are based upon my personal reading of the in-depth investigations (IDIs) of incidents of deaths and injuries associated with the use of products. They may include police reports, medical examiner reports, social worker reports, hospital emergency room and paramedic reports, and the Commission staff’s own interviews with the participants.

Reading IDIs and asking questions about them is a practice to which I have adhered faithfully as a Commissioner. I will continue to do so if I am confirmed in the position of Chairman. One cannot evaluate the need for product regulation without understanding all of the facts and circumstances surrounding deaths and injuries associated with the use of the product. I may find that the presence of the product was incidental, and that the real causes of the death or injury were not associated with the product, but lay elsewhere. These deaths or injuries could not have been prevented by any conceivable product safety standard. If regulation of the product will not reduce the risk of death or injury, then the Commission is not justified in proceeding with regulation.

## **CONCLUSION**

One of the rewards of public service is the privilege of working every day with people who share the goal of helping others. This has been my experience during my more than nine years of service at the Commission. The hard-working, dedicated, career staff at the Commission fuels the engine that allows a small agency to operate effectively. What provides me with the greatest personal satisfaction is the fact that our work at the Commission helps protect America’s families.

Mr. Chairman, I believe that my service and record at the Commission demonstrates a consistent, compassionate and responsible commitment to protecting our nation’s consumers from unreasonable risks posed by defective consumer products. I believe that I can do even more as Chairman of the Commission. I am attaching two letters to this testimony in support of my nomination, one from my fellow Commissioner Thomas Moore, and one from the National Association of State Fire Marshals. I ask that they be made a part of the record. Mr. Chairman, I want to thank you again for this opportunity to testify before you and share my views with the Members of the Committee, and to discuss my qualifications to serve as Chairman of the Commission. I would be pleased to answer any questions that the Committee Members wish to pose to me.