S. HRG. 111–905

# PROTECTING THE PUBLIC INTEREST: UNDERSTANDING THE THREAT OF AGENCY CAPTURE

## HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

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# PROTECTING THE PUBLIC INTEREST: UNDERSTANDING THE THREAT OF AGENCY CAPTURE

**TUESDAY, AUGUST 3, 2010**

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 10:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, Chairman of the Subcommittee, presiding.

Present: Senators Whitehouse, Kaufman, and Franken.

## OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Chairman WHITEHOUSE. The hearing of the Subcommittee will come to order. We will be proceeding without the Ranking Member. He has responsibilities elsewhere because of the Kagan nomination coming to the floor this morning and because of an appointment he has at the White House as well. So it is a scheduling conflict that is unavoidable. But I am delighted that the witnesses are here.

I have a brief statement I would like to make, and then the witnesses will be sworn. If other Senators have arrived, we will give them an opportunity to make a similar opening statement, and then we will get to your testimony, which is the order of the day.

Over the last 50 years, Congress has passed critical pieces of legislation to protect the public interest—laws that protect the water that Americans drink and the air we breathe, ensure the safety of the cars we drive and the medications we take, and require the fair and open trading of the stocks and mutual funds Americans invest in to finance retirement or our children's education.

In these and other areas, Congress has tasked an alphabet soup of regulatory agencies with the responsibility of administering the policies established by Congress through rulemaking, adjudication, and enforcement. As a result, regulatory agencies have vast and vital responsibilities to Congress and the American people. It is, thus, a vast and vital consequence that regulatory agencies retain their integrity, that they serve the public interest, and fulfill the missions defined by Congress.

Our administrative state has grown more complex than anything that our Founding Fathers foresaw. The fundamental principle is that the administrative agencies must further the policies crafted



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by Congress. But beyond that, the genius of the Framers of our Constitution at crafting checks and balances in Government was never applied to our modern administrative state. Here we are on our own.

It is often not in the economic interests of regulated industries to support the mission Congress has defined. Regulations that protect the public interest rather than the special interests do not always go down well with industry. Industries often have incentives to co-opt and to control regulatory agencies. Observably, time and time again, industries have acquired undue influence over regulatory agencies that exist to serve all Americans. Surreptitiously and stealthily, industries have sought to control regulatory agencies, to capture agencies. Sadly, industries too often have succeeded, turning agencies away from the public interest to the service of narrow corporate interests.

We have seen the disasters that can ensue when an agency has been captured, from MMS, whose failures and shocking behavior led to the horrors of the oil spill in the Gulf, to the SEC, asleep at the switch as financial services companies created exotic and irresponsible financial products that took our economy to the brink of disaster.

These are the fruits of regulatory capture: the revolving door, deliberate inattention, industry control, often outright corruption. It is a poisonous tree indeed.

This threat of agency capture is by no means a novel concept. As I have described previously on the floor, from Woodrow Wilson in 1913 through Marver Bernstein, the first dean of the Woodrow Wilson School at Princeton in 1955, to the Nobel Prize-winning economist George Stigler, to the editorial page of the Wall Street Journal this year, Americans from across the political spectrum have recognized the continuing danger of agency capture.

At bottom, agency capture is a threat to democratic Government. We the people pass laws through a democratic and open process. Powerful interests, nonetheless, want a second secret bite at the apple. They want to capture the regulatory agencies that enforce those laws so that they can blunt their effects, turning laws passed to protect the public interest into policies and procedures that protect industry interests.

In America we pride ourselves on open government. It is perhaps one of our signature contributions to government around the world. Unfortunately, however, agency capture is a deed that is done quietly and in the dark. The tentacles of industry intrude stealthily into the agencies. The agencies are often obscure, and there is a conspiracy of silence that surrounds agency capture.

Agency capture is also systemic. That is why it has been in the canon of economics and administrative law for nearly a hundred years. It is endemic and recurring because the institutional pressure of industry on the regulator is relentless.

Clearly, we in Congress must meet our constitutional obligation of oversight of the executive branch. We must work to stamp out agency capture whenever and wherever we find it. But ultimately protecting the public against the systemic, relentless, and institutional pressure will require a systemic and institutional counterpressure.

Episodic scandals and recurring disasters are no way to go through life. If the financial meltdown and the gulf disaster are not education enough about the perils of agency capture, the real harms that our country and our fellow citizens can suffer, then shame on us.

I look forward to the witnesses' testimony and to working with my colleagues to protect the integrity of our administrative agencies against the threat of capture.

Senator Franken, would you care to make an opening statement?

## STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator FRANKEN. Well, thank you, Mr. Chairman, for your focus on this subject and for calling this hearing. I look forward to the testimony of the three gentlemen.

I did not prepare an opening statement, but I was re-reading something that I had actually written about in 2003 that kind of spoke to this subject, and particularly on the Bush administration, and I think Dr. Troy has worked for that administration and is going to be speaking to the issue of agency capture. It was about the Interior Department, and I wrote about a number of people who had been appointed to the Department.

Mark Rey was appointed as Under Secretary of Agriculture for Natural Resources and Environment and put in charge of regulating forests, and he had previously lobbied for polluters of forests.

Bennett Raley was appointed to be the Interior Secretary for Water and Science, and he was put in charge of water, and previously he had lobbied for polluters of water.

Rebecca Watson had been appointed Assistant Secretary of the Interior for Lands and Mineral Management, and she was put in charge of land that contains minerals, and she had previously been a lobbyist for polluters of land that contains minerals.

Cam Toohey was made Special Assistant to the Secretary of the Interior for Alaska and was put in charge of Alaska and had previously lobbied for polluters of Alaska.

Patricia Lynn Scarlett was appointed Assistant Secretary of the Interior for Policy Management and Budget, and she was in charge of Government regulations and had previously lobbied for polluters of pretty much everything.

Steven Griles, who had been appointed Deputy Secretary of the Interior, I believe went to prison for some time.

It seemed to me that during the Bush administration there seemed to be agency capture of a certain type, which is having people who did not necessarily believe in the regulation of the industries that they were regulating put into position to regulate those industries and that these had been actually lobbyists for those industries before they were put in.

I also remember the agency FEMA, and there was this guy that we all remember, Michael Brown, who had been put in charge of FEMA and had been put in charge I think because the guy right before him, Allbaugh, had been his college roommate, and Michael Brown's previous job had been supervising the judges of Arabian horses.

I think that the reason that Brownie was given the job was not just that he had lost his job because he had been insufficiently able to supervise the judging of the horses, but that he was there to make sure that the previous head of FEMA would be getting contracts from FEMA, because he started a lobbying firm. And sure enough, when Katrina happened, not only did Mr. Brown not do a very good—not do a "heck of a job," but many FEMA contracts went where they were intended to go. And I think this is a kind of cronyism that was special, not unique to the Bush administration but led to a kind of agency capture that was pretty remarkable.

So I look forward to hearing all the different, more subtle kinds of agency capture than the very, very obvious ones that I have just discussed. And I am looking forward to the testimony of all the witnesses.

Thank you.

Chairman WHITEHOUSE. Senator Kaufman, welcome.

**STATEMENT OF HON. EDWARD E. KAUFMAN, A U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator KAUFMAN. Thank you, and, Mr. Chairman, I want to tell you, I cannot tell you how much I appreciate you holding this hearing. There is a lot of confusion out there, and it is not a matter of whether we have regulations or not. We have to have regulations. No one has come up with a plan that I have ever read that would have the Congress of the United States writing laws that immediately people had to adhere to. And one of the things that has made this Government work is that we have regulators, people who can spend every day dealing with the incredible, complex problems we have.

Many times in the debate today it is almost like, well, we are going to do away with the regulators; we are going to do away with regulation. That is not an option, and I do not know any serious thinker on either side of the political divide or the ideological divide that believes that we can do away with regulators and do away with regulations. Yet much of the debate is formed that way.

So what we are trying to do is figure out how do we have better regulators and better regulations? And some of us have the view—and I think it was an ideological difference that I think was truly felt by a number of people in the past administration—that we just do not need as much regulation, that, you know, there is too much regulation and Government is too big, it encompasses too much, and we just have—you know, I would say the folks by and large on this side of the aisle have a difference of view on that. And we can talk about that and how that worked and how it did not work in the past, and I think Senator Franken has done a good job of laying out some of the ugly things that happened when you have an administration that just does not believe we should have regulation and, therefore, has no commitment to it.

The more pervasive problem, I think, which goes from administration to administration, is the one that we have all read about for 30, 40, 50 years, and that is the idea of the iron triangle or the fact that what happens is the regulators get too closely involved with the administration and with the interest groups. And, clearly,

that has been around for a while, and that is good grist for discussion, and I think it raises a problem. It is a little like Madison 10, you know, where interest groups—freedom is to interest groups as oxygen is to fire. I mean, this is something—we are not going to—I put this in the category of things like cutting grass. Unless you want asphalt over your front lawn, every 2 weeks in the summertime you are going to have to cut grass, and we are going to have to cut this grass.

I think what is great about what Senator Whitehouse has done to pull this together is this is just one of a whole series of problems that have to do with regulation. It is not whether you have a view about regulation that is ideological and whether we should have it or not or how permissive we can be based on an overall Government policy. It is a little bit, but not really, the kind of iron triangle problem. This is a very specific point which—it is a revolving door. It is the lack of oversight. It is a lack of clear rules, and definitely it is a lack of conflicted—it is a fact we have conflicted regulators.

So I think what is great about this discussion today is, OK, let us decide we are going to have regulation and we are going to have regulators. We are going to decide that it is going to be the policy of the Government that we do the very, very, very best job we can in regulation. We have some revolving door problems of our own in the Congress, and there are revolving door problems in the administration. But what we are going to focus on today is kind of how do you get regulators that are going to be able to make the best decision and not be conflicted. I mean, I think that is really what we are coming to. How do you allow good people who are smart to sit together and have a discussion where one is not representing A Interest Group and one is not representing B Interest Group and one is not representing C Interest Group, because either that is where they came to, that is where they are going to be going afterwards, that is where they have a bond.

So I am really looking forward to the three witnesses today on what they have written, and I am really interested in seeing where we can go in order to make this better. This is really an incredibly important problem that we have to overcome if we are going to have successful Government, as all of us want, Republicans and Democrats, and most of all what the American people want. So I want to thank you again, Mr. Chairman.

Chairman WHITEHOUSE. Thank you, Senator Kaufman. Thank you for joining us.

If I could ask the witnesses to stand and be sworn. Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BAGLEY. I do.

Mr. SHAPIRO. I do.

Dr. TROY. I do.

Chairman WHITEHOUSE. I will just go right across the line. The first witness will be Professor Nicholas Bagley. He is an assistant professor of law at the University of Michigan Law School where he researches administrative law, regulatory theory, and health law. His article "Centralized Oversight of the Regulatory State," which he co-authored with Richard Revesz, was selected as the best

article in the field in 2006 by the American Bar Association's Section on Administrative Law and Regulatory Practice. Professor Bagley received his B.A. from Yale University and a J.D. from the New York University School of Law. He clerked for Judge David S. Tatel on the U.S. Court of Appeals for the District of Columbia and Justice John Paul Stevens on the United States Supreme Court. He also served as an attorney on the appellate staff in the Civil Division of the U.S. Department of Justice. We welcome him and appreciate his testimony.

Professor Bagley. Could you put your microphone on?

**STATEMENT OF NICHOLAS BAGLEY, ASSISTANT PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN LAW SCHOOL, ANN ARBOR, MICHIGAN**

Mr. BAGLEY. Mr. Chairman and members of the Subcommittee, it is an honor to testify before you today about agency capture.

In principle, agency capture is a simple concept: We say an agency is "captured" when it caters to narrow, private interests at the expense of the public welfare. As my testimony will explore, however, agency capture is, in practice, quite a bit more complicated than that.

The linchpin to understanding agency capture is the insight that industry groups will generally have enormous organizational advantages over the dispersed and apathetic public when it comes to lobbying Federal agencies. With some regularity, industry groups can exploit that organizational advantage to pressure regulators to attend to their private interests at the expense of the public interest.

For example, Federal agencies must of necessity cooperate with the entities that they regulate in order to procure needed information, compliance, political support, and guidance. And sometimes that cooperation can slip into capture. Agency officials might get distorted information from the industries they regulate; they might want to avoid the political or legal firestorm that would engulf their agency if they targeted a powerful interest group; or they might just start to see the world the way that industry sees it.

The revolving door between agencies and the industries that they regulate can also lead to capture. Agency officials often come from the private sector and may plan on returning once they have completed their stints as government employees. They may, therefore, share a common perspective with industry and may be reluctant to jeopardize the prospect of securing future employment.

These examples only scratch the surface of the myriad ways that industry groups can capture Federal agencies. And as the financial meltdown and the gulf oil spill both vividly demonstrate, the capture problem is real and it is of deep concern.

But a cautionary word is in order. While agency capture offers a compelling story about how some agencies operate some of the time, it is only a crude stereotype about agency behavior. Some agencies succumb to interest group pressure, but others, most others, resist it admirably. Federal agencies are complicated places, and no one story about how they operate will ring true all of the time.

Capture is also tricky because it is often very hard, if not impossible, to reliably identify. Although industry-agency contacts will occasionally be inappropriate enough on their face to suggest capture, most of the time they will involve altogether innocuous meetings, phone calls, and e- mails. And even if the agency has shown some sensitivity to the industry, that alone does not suggest that the agency has discarded the public interest. The crucial question is whether the agency would have more zealously performed its duties in the absence of pressure from the regulated interests, and most of the time it is going to be impossible to know the answer to that question to a certainty.

Further complicating matters, there is no consensus about exactly what agency capture is. For most academics, it means the dynamic whereby well-organized industry groups exert undue influence over agency decisionmakers to the detriment of the public. But for others, it is a broader concept. That encompasses an agency's perceived responsiveness to any outside agenda, however public regarding that agenda might be. For still others, capture is just shorthand for generic disapproval of agency behavior.

I do not mean by any of this to invite complacency. Agency capture is a recurring and urgent problem for the regulatory state. But because capture looks so different from one agency to the next, because it is difficult to reliably identify capture when it occurs, and because capture means different things to different people, no single silver bullet will eliminate agency capture. The job will instead require sensitivity to the particular bureaucratic and political context in which it arises.

We may also have greater success eliminating the conditions that allow capture to flourish than addressing capture after it has taken hold. Promising legislative remedies include carefully reviewing the sources and adequacy of agency funding, ensuring that agencies have not been tasked with conflicting missions, and enhancing the prestige of public employment in an effort to shut the revolving door.

In the final estimation, however, eliminating agency capture will require political vigilance. Vested interests that capture agencies are also quite capable of influencing politicians, and it will take more than a modicum of political courage to press for lasting change at some of our most beleaguered agencies. I hope that this hearing reflects a renewed commitment to addressing agency capture across the regulatory state.

Thank you again for allowing me to testify today, and I would be happy to answer any questions that you might have.

[The prepared statement of Mr. Bagley follows:]

Chairman WHITEHOUSE. Thank you, Professor Bagley. We very much appreciate your testimony.

Our next witness is Sidney Shapiro. He is the University Distinguished Chair in Law at Wake Forest University and the vice-president of the Center for Progressive Reform. He is the author of numerous books and articles, including "The People's Agents and the Battle to Protect the American Public," and two law school textbooks on regulatory law and practice and administrative law. In addition to his scholarly work, Professor Shapiro has served as

a consultant to the Occupational Safety and Health Administration and the Administrative Conference of the United States.

Professor Shapiro, welcome.

**STATEMENT OF SIDNEY SHAPIRO, ASSOCIATE DEAN FOR RESEARCH AND DEVELOPMENT, WAKE FOREST UNIVERSITY SCHOOL OF LAW, WINSTON-SALEM, NORTH CAROLINA, AND MEMBER SCHOLAR, VICE-PRESIDENT, CENTER FOR PROGRESSIVE REFORM**

Mr. SHAPIRO. Thank you. Mr. Chairman and members of the Committee, thank you for inviting me here today to share with you my views on understanding the threat of agency capture and its relationship to protecting the public interest.

The type of capture that receives the most attention is when an agency fails to protect the public and the environment because administrators friendly to industry block new regulatory efforts or do not enforce the laws and regulations then in effect. The situation at MMS, as Senator Whitehouse has pointed out, is a good example of this form of capture.

Capture can also occur from an imbalance in representation. This occurs when industry representatives regularly appear before an agency offering detailed comments and criticisms, while the agency seldom, if ever, hears from public interest groups or members of the public. A number of empirical studies revealed this imbalance is significant. The studies are described in my written testimony.

In one, a study of 39 controversial and technical, complex air pollutant rules, industry averaged 77.5 percent of the total comments while public interest groups averaged only 5 percent of the comments. In fact, public interest groups file comments for only 46 percent of the total number of rulemakings.

The final form of capture receives less attention, but it is no less effective in preventing reasonable regulation than the other forms of capture. This is sabotage capture. It occurs when regulatory critics create roadblocks that slow or prevent regulation, even in administrations that seek to protect the public and the environment. Because this capture is subtle and difficult for the public to perceive, it constituents a kind of sophisticated sabotage of the regulatory process.

The two most prominent forms of sabotage capture today are the de-funding of the regulatory agencies and the politicization of rulemaking by the White House. In my written testimony, I give examples of each problem. Allow me to mention one related to funding.

OSHA took more than 10 years to update its regulatory standard on cranes and derricks, even though the agency, employers, employees, and Members of Congress all agreed for that period what needed to be done.

If Congress is to reduce capture, it is more likely that agencies can fulfill its intention to protect people and the environment. I have four suggestions as to what Congress might do.

First, Congress cannot count on the administrative law system to ensure the accountability of regulatory agencies. Public interest groups lack the resources to match up with industry in terms of advocacy before agencies and the courts. Likewise, they are often not

in a good position to call Congress' attention to capture. It is, therefore, up to Congress to institute more systematic oversight.

Second, one reason for the de-funding of the regulatory agencies is that Congress has failed to study the impacts of funding cuts on the agencies. Without this information, Congress is not in a position to consider what tradeoffs are involved when agencies lack the resources they need and whether re-funding them is a higher priority than other items in the budget. But, frankly, regulatory agencies are such a small part of the discretionary budget that modest increases in funding would not affect the budget or the deficit in any significant way.

Third, the deterioration of regulatory government has gone relatively unnoticed because Congress lacks good means for measuring the performance of regulatory agencies. Congress should, therefore, require the development of positive metrics or measurements of agency performance that would alert Congress and the public when health and safety agencies have been captured.

Finally, the Congressional dialog over funding would be improved if agencies were required to make it clear how much money it would take to actually implement their mandates. Such true-up estimates would focus on the resources Government itself would need to do the work that Congress expects it to do.

In conclusion, the problem of capture is persistent, suggesting it is not easily remedies. In the 1970s, the Senate undertook a major study of Federal regulation. A similar effort focused on capture, and including the consideration of such new ideas as positive metrics and true-up budgets may be in order. The study could also consider the costs of delay when agencies, because of a lack of funding, are unable to protect the public and the environment. The newly reformed Administrative Conference of the United States could be tasked with assisting Congress in this investigation.

Thank you.

[The prepared statement of Mr. Shapiro appears as a submissions for the record.]

Chairman WHITEHOUSE. Thank you very much, Professor Shapiro. We really appreciate you being here and lending your expertise to this inquiry.

Our final witness is Dr. Tevi Troy. He is a Visiting Senior Fellow at the Hudson Institute, a Senior Fellow at the Potomac Institute, and a writer and consultant on health care and domestic policy. From 2007 to 2009, Dr. Troy was the Deputy Secretary of the U.S. Department of Health and Human Services where we worked together through our common interest on advancing health information technology. Before going to HHS, Dr. Troy served as Deputy Assistant to the President for Domestic Policy. He also has worked in both chambers of Congress. He holds a Ph.D. in American civilization from the University of Texas, and we welcome him here today. Dr. Troy.

## STATEMENT OF TEVI D. TROY, PH.D., VISITING SENIOR FELLOW, THE HUDSON INSTITUTE, SILVER SPRING, MARYLAND

Dr. TROY. Thank you, Mr. Chairman, and thank you, members of the Committee, for this opportunity to come and provide insight into the question of influence on the regulatory process. I ask with

your permission, Mr. Chairman, that my entire written testimony be placed in the record.

Chairman WHITEHOUSE. Yes, the full written testimony of all the witnesses will be in the record.

Dr. TROY. Thank you, Mr. Chairman.

My name is Tevi Troy, as you said, and I am a Fellow at the Hudson Institute and former Deputy Secretary at the Department of Health and Human Services, and as you mentioned, while I was at HHS, I had the pleasure and opportunity to work with you on advancing health information technology, which I appreciated, and I appreciate your dedication to the subject.

Capture theory, about which we are here to speak today, I think speaks to a real phenomenon, which is the mix of human nature and human incentives with increased Government power and authority and increasing Government influence. And it makes sense, as laid out in public choice theory, that when you have people with more skin in the game, people who are affected more by regulations, they will make more attempts to influence the process. They have more incentive to do so. They will put more resources into it. But I think it is important to remember in this context that this theory applies to more than just industry and that there are multiple countervailing interests that I saw in my time in Government that try and have an influence on the process. Unions, nongovernmental organizations, think tanks, and public interest groups all have a say in the process, and that procedures that are in place to combat capture should address capture from any of the potential sources that can all get in the way of protecting and improving the public interest.

And in terms of procedures and mechanisms in place to prevent capture, what I saw in my time in Government is obviously you have the APA, the Administrative Procedures Act, which is supposed to inject sunshine into the entire process. It gives specific amounts of times for regulations to be out there, for Notice of Proposed Rulemakings, Advance Notice of Proposed Rulemaking, et cetera, and also requirements about meetings with outside influences to be put in the record or in the Federal Register. We know the Obama administration has actually increased some of those requirements. Any meetings with lobbyists, whether they be from industry or outside, need to be made public, and the full transcripts need to be put in the record. And I think those are important mechanisms.

I also want to put in a good word for the staff at OIRA, the Office of Information and Regulatory Affairs. They are the staffers at the Office of Management and Budget who have oversight over all the regulations, and they are very good at what they do, and they are by very nature designed to prevent capture because they do not work for the specific agencies that are doing the regulating. They do not work for the regulatory agencies. They work for OMB and they have overall oversight, and I think they are helpful in the process.

Then obviously you have political appointees who are supposed to provide some oversight into the process as well and make sure that the public interest is being served. And then, of course, the career staffers. Now there is a lot of talk about the career staffers,

whether they are captured, whether they are beholden to industry. I know that in my time in Government, it was very rare that people thought that they were specifically beholden to industry, and you often have people speculating whether career staffers are either pro-Democratic or pro-Republic or pro-business or anti-business. But what I found in my time in Government is that career staffers do have a bias, and their bias is in favor of their own agency. This bias is designed to make them protect the interests and the prerogatives of their agency. Sometimes it means they may have a narrower view, and that is why the overarching view or the wider view of either the political officials or of the OIRA is important and helpful, but they do have their agency's interest in mind.

Of course, there is also external oversight. You have Congress, the Inspectors General, the GAO. And then another layer on top of that is the press, which is supposed to make sure that these problems are not taking place, and they will highlight it if there are problems, and believe me, you will hear about it, and they will do so with glee.

In acting about this issue of capture, there are two things to watch out for. First, expertise is needed. You need to have people who know about the systems that they are regulating, and whether they come from industry or NGO's or public interest groups or unions, they bring to Government preconceptions with them, but they also bring expertise. And it is their job and obligation, once inside, to drop the preconceptions, but also maintain the needed expertise.

And then, last, I would say that regulatory capture is also potentially a two-way street, that sometimes you see in the FDA, for example, that the industry folks are so terrified of their regulators that they will not call out the agency even if it appears to overstep its bounds because they know that the agency has life-or-death power over their own industry and their own company.

In conclusion, Mr. Chairman, I will just say that I found the system is not perfect, but there are also key actors, especially the staff at OIRA, who are aware of the flaws in the system and work very hard to try and make sure that we are not brought down by those flaws.

Thank you very much for this opportunity.

[The prepared statement of Dr. Troy appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you very much, Dr. Troy.

I am going to be here, obviously, until the end of the hearing, so I am going to yield shortly to Senator Kaufman. But I did want to open with one point. When we have a panel of witnesses—I have read carefully through all of your testimony, and I like to try to identify the places in which everybody seems to agree, and I found in your testimony six areas that I believe are areas of common agreement.

The first is that this problem of agency capture is a widely accepted phenomenon, to quote Dr. Troy's testimony just now, "a real phenomenon." Professor Bagley cited, you know, Stigler, Huntington, Posner. There is a wide array of very prestigious names that for decades have accepted that this is, again to quote Dr. Troy, "a real phenomenon."

The second is that there is a lot at stake here for the regulated industries. This is a matter of millions, tens of millions, even hundreds of millions of dollars in some cases.

The third point is that there is a mismatch out there, whether you describe it as an enormous organizational advantage, the way Professor Bagley did, or describe that certain actors do have greater interest and put more effort into the process, as Dr. Troy did.

The fourth is that some of the mechanisms of administrative procedure lend themselves to abuse, and, therefore, the system can be gamed.

The fifth is that regulatory capture is by its nature done in the dark and done as quietly as possible. No one plants a flag when they have captured an agency. In fact, they will do their utmost to deny it.

And, finally, it is that the potential damage from agency capture, as MMS and the SEC have shown, can be huge, both in terms of the violation of Government principles, of openness, candor, and responsiveness to the electorate and all of that, but more to home in terms of the terrible potential outcomes that the gulf has seen and that families in Rhode Island and across the country have seen as the tsunami of misery that flowed out from the Wall Street meltdown, hit town after town, city after city, county after county.

So I think that we actually have a certain amount of common agreement here despite the fact that we have a diverse panel of witnesses, and I just wanted to lay that out there. We can talk more about that when it is my time.

I will yield now to Professor Kaufman—to Senator Kaufman.

Mr. SHAPIRO. What a demotion.

[Laughter.]

Senator KAUFMAN. No, not really.

I think that is excellent, presenting that, and it really is amazing when you start reading about this how unanimous it is about this is a great concern and how difficult it is to solve.

Professor Bagley, you said that most agencies are able to resist capture admirably. Could you start and then each one of you give an example of one or two poster—what you think are kind of the poster children in agencies that were able to resist regulatory capture?

Mr. BAGLEY. I can certainly speak in general terms. I think very few people believe that the Federal Trade Commission is a subject of capture. They have a professional staff. They take their jobs very seriously.

I think that, generally speaking, EPA has not been subject to capture, although it has been clearly subject to political influence from the White House, but I think the staff there is—again, they are professional. They act with integrity. They care deeply about the values that their agency espouses. And I think like most Government officials, they do their jobs well.

Senator KAUFMAN. Professor Shapiro.

Mr. SHAPIRO. This is really going to sound like an academic answer, and I do not mean it to be. But first we have to decide on what we mean by capture, and I think I have a slightly different concept of capture than perhaps the other two speakers.

I agree with Dr. Troy that when a conservative President takes office, he or she is entitled to appoint administrators who reflect that President's point of view. And so as a result, for some of us we see agency performance which is less robust than would be my personal political preference. But that is the way of the system.

Senator KAUFMAN. Yes, and I would like to say I totally agree with you on that. So what I would like to focus in on is, you know, just the—not the fact that there are differences in the rest, but an agency that you think, using your examples of regulatory capture, the three kinds, an agency that is pretty well, you know, fought it off.

Mr. SHAPIRO. Well, that is right. So what we are talking about are instances where the political administrators seek not to move the ball down the field, albeit in their particular policy way, but do not move the ball at all or toss it backwards. You know, to what extent can agencies resist that? And I think that of all the agencies EPA has been the most able to do that, and I think there are two reasons for it: that among the agencies we are talking about, although they are all short on funds, it is probably the best financed and has the biggest professional staff. And I think that both of those things go well towards its ability to fight off this because it has a dedicated staff who attempt to fight it off.

Senator KAUFMAN. Thank you.

Dr. Troy.

Dr. TROY. Yes, thank you for the excellent question, Senator. I would turn it around a little bit and say that for me to pick one agency would make it sound as if I think that the majority of the rest of them are——

Senator KAUFMAN. No, no. By the way—no, let me——

Dr. TROY [continuing]. Subject to capture, so I—I just want to make it clear that I——

Senator KAUFMAN. Let me stipulate the fact that this is not—you are not saying that the rest of them are all bad. What I am trying to do is kind of get the good agencies I have had, because I am not—you know, I look at it and I see some agencies that I am not happy with, but I would really like—especially you, you have worked and so kind of—your view. No, by that I am not—I am stipulating the fact that these are just the shining stars, the 10s. There are loads of 9s out there, and 8s and 7s. But we are looking for the 10-pluses.

Dr. TROY. Right. So that said, that I believe that most agencies do resist capture or at least have these countervailing forces that they are trying to prevent capture from any one place. But the FDA did a very good job. I know a lot of people criticize the FDA, and they get a lot of criticism from the industry, but also from Congress and also from the public interest groups. So they are sort of hit on all sides, but I think that they do a very good job of trying to resist capture and base their decisions on sound science and on the public health.

Senator KAUFMAN. And so what is the reason—I mean, Professor Shapiro gave his reasons. Why do you think those agencies—and spread it out a little, just successful agencies. What is it about them? Is it the structure of the agency? Funding is part of it, and staff is part of it. I think part of it, too, would be how big your job

is. The Securities and Exchange Commission has a pretty big staff, but they have got a gigantic area that they are trying to cover, so it is kind of how—is that, Professor Shapiro, fair to say, that it is the staff, funding in relation to what the job is, right?

Mr. SHAPIRO. It is also the adequacy of the regulatory statute, so some agencies I think are more easily captured because they are starting from a position that is, you know, 10 yards behind where they want to be, so they are more easily captured because it is harder to get stuff done.

Senator KAUFMAN. I think I am going to stop now. My time is up, and I will come back again. Thank you very much.

Chairman WHITEHOUSE. Senator Franken.

Senator FRANKEN. Professor Bagley, former Chair of the FCC Reed Hunt—and this is while he was Chairman of the FCC—once said that FCC stood for "firmly captured by corporations." Like Mr. Hunt, I am deeply concerned about agency capture at the FCC.

In June, public interest groups criticized the FCC for keeping them out of critical meetings that the agency held with executives at AT&T, Verizon, the National Cable and Telecommunications Association, Google, and Skype to work out a compromise on net neutrality legislation. What is your advice to advocates who do not represent a media conglomerate or a trade association who would want to be in meetings like that one?

Mr. BAGLEY. That is a good question, Senator.

Senator FRANKEN. Thank you.

Mr. BAGLEY. I am not an expert on FCC practice, but I suspect that they should cultivate the kind of relationships that industry groups have cultivated over a long period of time with folk who work at the Commission. Obviously, they are going to be outmatched in that game in many respects. But it is only by being a consistent player and being diligent about efforts to bring your issues before the Commission that you are going to be successful.

But I think the point that you are making is one that is largely intractable in the sense that these groups are going to be outmatched no matter what they do, and so it is really not up to them to help even the playing field. I think it is——

Senator FRANKEN. It is up to us?

Mr. BAGLEY. I think it may have more to do with you. It may have more to do with the Commissioners and the FCC staff taking steps to ensure that the public interest is heard. But Congressional oversight is an enormous factor.

Senator FRANKEN. Well, I want to follow up with the FCC on this and maybe do this for Dean Shapiro.

Another piece of evidence that I think that the FCC has been captured by corporations that it is supposed to be regulating is the fact that it has accepted unrealistic promises from the corporations that it is regulating without setting up mechanisms for enforcing those promises.

Now, I go back to when the FCC was going through renewing fin-syn, the financial syndication regulations which limited the number of shows, programs that networks could own. And I remember during those hearings all the networks promised that if fin-syn was discontinued or was allowed to expire, they would not use this to favor their own programming. And they made all kinds

of promises: "Why would we favor our own programming? We are in the business of ratings. Whatever the best shows are, those are the ones we are going to put on."

Well, as soon as fin-syn was rescinded, boom, the word went out to the creative community, "We are going to own the shows. And if you are an independent producer and you want a show on our network, you are going to have to give us ownership." And everybody knows this. And yet the FCC did nothing, and we are seeing the same thing now in this proposed Comcast-NBC/Universal merger where they are promising all kinds of things, and I do not see any reason why anyone would expect that they would hold to those promises.

Do you have any advice on how we can avoid the effects of this and how the FCC can avoid this or what we can do about this?

Mr. SHAPIRO. Well, if I had the solution, my books would sell better, but two things.

First, the sort of classic administrative law solution to being excluded from the front end from the rulemaking is the opportunity, as Dr. Troy mentioned, to put evidence in the rulemaking record with which the agency has to deal and the courts will take a look at that evidence and see whether or not the agency has adequately dealt with it.

As I mentioned in my testimony, the flaw there is that the public interest groups are often not well financed to even take that step, and there are lots of rulemakings where there are no comments whatsoever by the public interest community.

Second, as you have put your finger on, as weak as the public interest groups may be many times in the rulemaking phase, their ability to monitor the enforcement phase, the actual implementation, is even weaker because there are no good administrative law solutions where they can come in and try to force the agency to actually implement what it has said it will do.

So the best I can come up with is, again, to suggest that we need to develop over time some sort of metrics to measure the performance of agencies, and an important aspect of those metrics would be what they do on the enforcement side and whether or not they actually enforce the regulations as they are written.

Senator FRANKEN. My time is up, but maybe we will get back to this because I want to get into the kind of—perhaps in the instance of a merger, that if it is allowed to go forward, the kind of rigorous conditions that can be placed on it and the setting up of mechanisms to enforce those conditions.

Thank you, Mr. Chairman.

Chairman WHITEHOUSE. Before I return to Senator Kaufman and Senator Franken for a second round, I would like to go back to my six postulates, if you will, where I think we have agreement. It is a real problem. There is a lot at stake for the regulated industries, lots of motive, one might say. Three, the organizational advantage, mismatch. Four, administrative procedure can, in fact, be gamed. Five, agency capture is inherently done surreptitiously and, therefore, evades accountability and notice. And, finally, as we have seen from both MMS and the SEC, the potential damage to regular families and ordinary people and the well-being of our country is often vast when there is a very significant regulatory failure.

So that is my hypothesis, that those six points are essentially undisputed by the panel. Professor Bagley?

Mr. BAGLEY. That sounds right to me, Senator. I think that the core point that I would want to take away from our testimony today is that when you talk about agency capture, you are talking about a complex of problems whereby well-organized, well-heeled interest groups are likely to be able to bring a lot of pressure to bear on agencies under the cover of darkness. And there are a great many mechanisms that one might employ, depending on the agency and the bureaucratic and political realities on the ground. We will therefore want to be attentive to those differences as we look at different agencies. What works at the Department of the Interior may not work at the financial regulatory agencies.

Chairman WHITEHOUSE. Professor Shapiro.

Mr. SHAPIRO. I also agree with all of those and, in particular, No. 6 about the potentiality of the damage.

Going back to my OSHA example, for example, that is where OSHA took over 10 years to bring out this crane and derrick rule, which nobody opposed. In fact, it was the industry that petitioned the agency to try to update the rule. By OSHA's own estimates, each year there are 89 crane-related deaths and 263 crane-related injuries each year. And OSHA has estimated the rule, which they finally adopted, would decrease that by 60 percent. So, in other words, for every year the rule sat on a desk, 53 people died and another 155 were injured unnecessarily. So it is not only the big things, the gulf oil spill that everybody recognizes, but it is agency by agency in these small details of not doing what Congress has expected the agency to do.

Chairman WHITEHOUSE. Dr. Troy.

Dr. TROY. First——

Chairman WHITEHOUSE. Your microphone.

Dr. TROY. First I will turn on the microphone. But, second, I would like to commend you, Mr. Chairman, for trying to bring synthesis, for trying to find points of agreement, because I think that is a very useful way to proceed, especially in our often hyper-partisan environment that we have today. And I would say——

Chairman WHITEHOUSE. Not around here.

[Laughter.]

Dr. TROY. But I would say that I can have agreement with the six points, but I would have to make slight amendments to some of the points.

So, for example, when you say it is a widely accepted phenomenon, I agree it is a widely accepted phenomenon that it is attempted. I do not agree that it is always successful. I would certainly agree that there is a lot at stake for everyone, not just——

Chairman WHITEHOUSE. Yes, and I would amend my point. There is a constant pressure to do it, but it is not always successful.

Dr. TROY. Right. Third, in terms of the mismatch, the best way, I think, to describe the mismatch is not between industry and non-industry actors so much as between interested and uninterested parties. I think that is where the real mismatch is. I think there are a whole bunch of groups, and I think your crane example is one where there are industry and non-industry forces that were inter-

ested in the derrick/crane rule, but the public did not care at all. And so this larger notion of the public interest is not represented. I would be interested——

Chairman WHITEHOUSE. Let me challenge that briefly, because one of the witnesses—I am not sure if it is one of the present witnesses or one of the witnesses who filed written testimony that we will put in the record—made this point which I think is pertinent to the point that you are making and runs a little bit counter to the point that you are making. That is, that there is a difference between an interested industry and an interested non-industry actor, like an NGO or a public interest group; and that is, that the interested industry, if they can make sure that the regulator does things the way they want, can achieve very substantial results that are of immediate benefit, very often of immediate financial benefit to them. And it is a 100-percent proposition that the benefit that they get comes back to them in the form of real dollars, real cash, real value; and that the proposition is a little bit different for an NGO or another agency which is arguing on behalf of the public interest, because what any individual gets back is only their share of the larger public interest.

And so there is an inherent mismatch in function between somebody who is arguing for a private interest and somebody who is arguing for a public interest in which they only share a small and proportionate piece.

Dr. TROY. Sure, and I understand the point. But sometimes you have non-industry actors that have a financial stake in something. So, for example, if a labor union has a provision that they are pushing that will increase employment by members of their union, that is a financial stake that they have in the process. So I would say that it is wider than just——

Chairman WHITEHOUSE. You would agree with the principle that where there is a direct financial stake, that creates a mismatch in terms of motivation, but that that direct financial stake is not necessarily always on the side of industry.

Dr. TROY. Yes, I would agree with that.

Chairman WHITEHOUSE. OK. Senator Kaufman.

Dr. TROY. Can I finish the six points——

Chairman WHITEHOUSE. OK. I have gone over my time, so why don't we come back to it later and let Senator Kaufman proceed.

Senator KAUFMAN. Why don't you finish the six points? I think this is very helpful.

Dr. TROY. OK. The mechanisms that lend themselves to abuse, I think in all of your six points you kind of laid out what you were talking about, and I was not sure exactly what you were referring to with respect to the mechanisms that lend themselves to abuse.

With respect to capture in the dark, of course, all inappropriate behavior takes place in the dark. I am reminded of Abbie Hoffman, who had his list of the ten people who got away with it, and there were nine named people, and the No. 1 person who got away with it was the person you do not know about because you never heard about it. So, yes, of course, I would agree with that.

Then the potential damage is vast. I agree with that, both for regulatory failure, as you were talking about, but also for poor reg-

ulations that do not manage the problem correctly and could impose huge costs.

Senator KAUFMAN. Professor Shapiro, you talked about the fact that it is hard for people to monitor what actually happens once the regulations have passed. This was a question I was going to ask in another—but it really fits right here. Isn't that kind of Congressional oversight? I mean, isn't a major thing that allows regulatory capture to occur—and I would like each one of you to—the fact that—or be successful or not successful depend on how much Congressional oversight you have of the regulated—of the regulatory body and how much is focused on trying to deal with potential regulatory capture?

Mr. SHAPIRO. Yes, of course. But Congress is also at a disadvantage to do oversight effectively. We have to know exactly what the agency has accomplished and has not accomplished. So if we had some sort of metrics, for example, if we knew that EPA is at 51 percent of accomplishing its statutory responsibility to provide clean air, and if we monitored that for a number of years, and they are either not moving forward or, worse, we are moving backwards, that would put Congress in a much better position to say we need to look at that.

Now, it does not tell you why they are not moving forward, but at least it tells you they are not moving forward. And there is a blizzard of statistics on the EPA Website. There are thousands of studies and statistics, and I do not think anyone can make any sense out of them. There are just too many, and it is too confusing, and I think we need to focus on something that tells not only Congress but the American public what is going on.

Senator KAUFMAN. Yes, but I think if you look at most of those, it is because people are looking at different ways. I am an engineer. I love the objective. I really do. I really love objective. But I find more and more when you are trying to do an oversight that the blizzard of statistics do not tell you what is happening. It is a subjective judgment you make as a Member of Congress with staff, with good staff, which we have and which committees have to look at that.

But, Professor Bagley, what do you think in terms of the role of Congressional oversight in trying to assure that the regulations work for everybody?

Mr. BAGLEY. I think if you examine capture where it occurs, it most often arises at those forgotten agencies, the ones that have no friend left either in Congress or in the public. And so the Consumer Protection Safety Commission is a notorious example of a captured agency. That is in part because it is very small, and although it has critical responsibilities for protecting consumers from products that might be defective, it has largely proven unable to match its industry counterparts.

What is challenging about that, I think, is that, again, as I mentioned in my testimony, industry groups are also able to influence legislators. And so there are not going to be a lot of political gold stars for reforming some of those agencies. This is strictly a good-government problem, which means it is a hard problem to resolve, especially in a hyper-partisan environment. But I do think it is worth expending a fair amount of political capital to weed out the

problem in an effort to protect the American public in the way that Congress, at the time that it enacted these statutes and created these commissions, intended.

Senator KAUFMAN. Great. Dr. Troy.

Dr. TROY. I think that the more attention that is paid to an agency, the less likely you are going to have this type of inappropriate behavior. I remember there was one time at HHS that there was a very obscure regulatory agency that came out with what was just a terrible regulation that nobody really knew about because it was such an obscure agency. The New York Times had a piece criticizing it, and then all of a sudden, people started paying a lot more attention, and we were able to correct the flaw, which would have actually harmed the goal of medical research.

So I think that when more people are paying attention, you are apt to get better results.

Senator KAUFMAN. I would propound a seventh agreement for the panel: Mr. Chairman, the fact that Congressional oversight is key in terms of keeping regulators on track and what they are doing.

Chairman WHITEHOUSE. It will be added to the list.

Senator KAUFMAN. Thank you. I now feel vindicated.

Professor Shapiro, can you go back? In the crane incident, it sounded to me like that was just kind of bureaucratic arteriosclerosis as opposed to interest group. Was this something where the crane industry held it up? Or what do you think was the cause of the crane problem?

Mr. SHAPIRO. Funding.

Senator KAUFMAN. Funding for the agency to go out and actually study what happened?

Mr. SHAPIRO. Yes—no. Just funding to get the work done. There are just not enough bodies at OSHA to do what they need to do. For a book I just completed, we did a study of the budgets of the five major regulatory agencies, which would include OSHA. And with the exception of FDA, which has received modest increases because the pharmaceutical industry pays fees for drug approvals, all of the five major agencies have approximately 50 percent of the largest budget that they ever had in real dollar terms because of inflation, and none of them have received significant budgetary support for about 20 years.

Senator KAUFMAN. I think that gets back to your original point about an administrative mind-set on whether you should have regulation or not and how robust it would be. One of the things to do is just squeeze the agency so it does not have any money to do what its function is.

Mr. SHAPIRO. Yes.

Senator KAUFMAN. OK. Thank you, Mr. Chairman.

Chairman WHITEHOUSE. Senator Franken.

Senator FRANKEN. First of all, I think when you were talking about the imbalance between the public interest and groups that are fighting for the public interest and private interests, was that from your testimony, your written testimony, Professor Bagley?

Mr. BAGLEY. That is right.

Senator FRANKEN. What I found interesting about your testimony was how nuanced all of this is and how sometimes we can

get—by painting things with a broad brush, we can miss things and kind of create stereotypes of capture that actually do not serve us very well. So I am really interested in how we in Congress can do the oversight and do it properly and—because it seems like we get captured, too. We get captured by the industries that sometimes you will have an industry in your State that provides a lot of jobs, and your job is to represent your State and the people who work in your State. So you, of course, will want to help that industry. And you will be working very closely with that industry. So a lot of this gets very, very subtle.

I think you also talked about capturing sort of subcommittees that are directly responsible and how we have to watch out for that.

What I really would like to ask you all is how—put yourself in our shoes. How would you advise Members of Congress, I guess Members of the Senate, to best address the oversight of agencies and to best address agency capture so that we can do our jobs properly? What advice do you have for us?

Mr. BAGLEY. I have a few thoughts. I think an overall cautionary word is emphatically in order, which is this is going to be a tricky problem. I appreciated Senator Kaufman's analogy to cutting the grass every 2 weeks. It is a kind of regulatory hygiene that has to take place.

One option would be to take the oversight responsibility away from the subcommittees. For example, this Committee oversees regulatory bodies across the administrative state. You may not make friends on the relevant subcommittee, but if you have concerns about an agency, there are investigations that you can run, there are reports that you can write about failures. And that allows you to avoid some of the capture problems because the industry groups that you may not want to tick off are not going to be the same industry groups that the Subcommittee members do not want to tick off. And so it is possible that by having a Subcommittee that has less of a passion about the particular industry, you might be able to make some improvements.

I mention in my testimony a few different possibilities. One is to focus on funding. That is a recurring theme that you are hearing today, which is that agencies have not been funded adequately, and the lack of funding can make it very difficult to attract good people. It can make it very difficult to retain good people. It can make it very difficult to fend off overtures from industry.

Another meaningful reform you could look at is going through the Federal agencies and looking at how they are structured. There are some that have built-in pathologies, and I mention in my testimony how several of the financial regulatory agencies receive funding from the groups that they regulate.

Senator FRANKEN. Right.

Mr. BAGLEY. Which is a problem because the groups they regulate can shop around for the most attractive charter.

Senator FRANKEN. There are two: the Office of Thrift Supervision and——

Mr. BAGLEY. Sure. You heard during the financial crisis that there were banks that were seeking to convert their charters from national banks to national thrifts because they thought that OTS

had a lighter hand. That is just—I mean, that is a fixable problem and the kind of problem that could be resolved by an oversight committee.

Senator FRANKEN. I think we fixed it in the reform bill by eliminating——

Mr. BAGLEY. You eliminated OTS. There are still problems. Banks——

Senator FRANKEN. Kind of a competition between the two agencies to be more lenient in order to get——

Mr. BAGLEY. Right. There is still the remaining problem that banks can go from state to national charters, so there is still competition between regulators. But it is a step forward.

There are lots of problems—there is a lot of low-hanging fruit in the regulatory state, and it will require some attention to detail. And, again, there are no political gold stars for this, but there are fixable problems that abound.

Chairman WHITEHOUSE. If I could follow up on that, one of the puzzlements about this is that this regulatory capture phenomenon has been known about for 90 or so years. It has been all over the academic literature. It has been part of what I learned in law school, you know, years ago. We have seen over and over again instances of it happening. We have had these two huge catastrophes recently to our country that seem very likely to trace back to episodes of regulatory capture. And yet on our side, there do not seem to be much in the way of efforts to set up any kind of consistent institutional either counterpressure or assessment mechanism to push back a little bit against or shed light on what I think everybody concedes is a relentless, constant, surreptitious pressure that needs to be looked out for.

Some of the testimony mentioned the Senate report that was done back in the 1970s, but other than that, this does not seem to be a very vibrant part of our debate around here. And when you look at the stakes and when you look at the catastrophic effects and when you look at the persistence of the problem, I am surprised that there has not been more work done on it. And you all have looked at it, you know, for a long time to varying degrees.

If we were to look back and say, OK, what are the sort of foundational reports and documents and studies that have been done in Congress to, you know, sort of stand on the shoulders of giants, where do we begin? Where is the best work that has been done in the past to flesh this out and come up with ideas? Is there that history of Congressional effort and oversight that we could look back to?

It does not sound like it. Professor Shapiro.

Mr. SHAPIRO. I think all this was done in disfavor about 10, 12 years ago when Congress—more than that, I guess—de-funded the Administrative Conference of the United States. And I am very happy that Congress recently has re-funded the Administrative Conference of the United States.

During the years they were up and operating, they really served as a kind of neutral think tank inside the Government. The Conference had a staff. It would hire law professors to do studies. The Conference itself was made up of perhaps 150 people from across Washington, leading lawyers, people from inside the Government,

and at least as I was able to watch it work, I think it was a pretty objective attempt to figure out what works and what does not work. And now that it is back, I think you can take advantage of it.

Chairman WHITEHOUSE. Is that why it got de-funded?

Mr. SHAPIRO. It is not quite clear why it got de-funded, but it showed up one year in the House appropriations with zero funding, and the Senate did not put it back. Then the ABA, the American Bar Association, fought for a long time to get it re-funded, and it is now just beginning again.

Chairman WHITEHOUSE. Now, one of the themes that seems to have been developed also from all of you in your testimony is that in terms of whatever we wish to think about establishing in order to protect against or counter the pressure toward agency capture, it should not be something that is in the same agency as the one that is the target of the capture.

Dr. Troy suggested that OMB might be a good location for the very reason that it is outside of the agency and is less vulnerable to being swept into whatever the politics are that have allowed the agency capture in the first place.

Professor Shapiro, you have suggested the Administrative Conference, again, an outside entity.

I do not know if you have spoken to this, Professor Bagley, but is this a common theme, that wherever we do this, it should be outside of the—if there is going to be an authority of some kind that has this task, it should be in a central location some place and can look across multiple agencies?

Mr. BAGLEY. I would have two comments about that. The first is that some of the most compelling reports about agency capture that we have heard of come from Inspectors General.

Chairman WHITEHOUSE. From the IGs, yes.

Mr. BAGLEY. Which operate in sort of an "at the agency, but not at the agency" capacity. The IGs have the investigatory resources and the know-how to ferret out some of these very difficult problems to see. They also have relationships with staff members, so they actually can be pretty effective voices in this process. Putting the experts in a centralized location may insulate them from some pressure——

Chairman WHITEHOUSE. But you will agree with me that Inspectors General vary from agency to agency in terms of their individual capability, their motivation, their willingness to tangle with the power structure.

Mr. BAGLEY. That is absolutely true.

Chairman WHITEHOUSE. Some are great, some are pretty lousy.

Mr. BAGLEY. That is exactly right.

My concern with placing a super cop in OMB is just that to a hammer everything looks like a nail. And, in fact, a super cop may not have the kind of deep, fine-grained regulatory know-how to really get at the problem.

One alternative is to create a super cop-type agency within OMB, but ensure that it is staffed, at least on a rotating basis, from the agencies that are the targets of high-profile investigations. So imagine for a moment that there was an agency within OMB that decided to look into sub-agencies within the Department of the Interior. Well, you would probably want a few people from Interior

to come on over for a little bit to tell you what the score is, how things work.

You do not want to give the responsibility to a bunch of generalists, especially a bunch of generalist lawyers who do not know anything about anything and would have a very difficult time——

[Laughter.]

Mr. BAGLEY. Speaking as one. Who would have a very difficult time wrapping their hands around the problem. So we will want to be very attentive to ensuring that the kind of expertise necessary to find out if agency capture is occurring and address it where it exists.

Chairman WHITEHOUSE. Would a relationship between the central entity and the Inspector General of the agency be a good vehicle for getting that?

Mr. BAGLEY. I think it could be. Again, as you caution, Inspectors General vary. Some are worthless, some are terrific. But you will——

Chairman WHITEHOUSE. The worthless ones might pick up their socks a little bit if they felt that they had the central agency looking over their shoulder on this.

Mr. BAGLEY. That could be. You can also imagine a model where the central agency would visit IGs offices and bring manpower, resources, staff, and hard thinking to these particular problems. It will require money.

Chairman WHITEHOUSE. Senator Franken.

Senator FRANKEN. I am going to pick up where Professor Bagley is talking and ask Dr. Troy something, because you were talking just now about making sure that this entity that we are talking about would have expertise from the agencies they are investigating; and Dr. Troy talked about one of the—an area that I want to get at, which is kind of the revolving door, where you do need expertise in—let us say, there is a revolving door very often between defense contractors and the military, and you have people who are in procurement go to work for a contractor, and so you wonder whether while they are in procurement whether they are being extra nice to a contractor so that when they go to the contractor, will they get hired, and will they get hired at a very inflated salary? I mean, this is a real problem that we have. On the other hand, you need that expertise. That is a conundrum that I see, and I was wondering who here—and I will go to Dr. Troy first, if you have any thoughts about that in terms of how—there are cooling-off periods that we have. Are there any kinds of—what kind of thinking have you done about this kind of problem?

Dr. TROY. Thank you, Senator. I agree that the cooling-off periods are very helpful. I think a lot of times Government officials who may think they have been nice to a certain industry, they leave and then they have a cooling-off period, and they realize that the industry may not want to talk to them anymore. So the cooling-off period can be very helpful.

I know when I was leaving Government, the ethics rules were very strict that I could not talk to any prospective employers while I was still in Government, and I think that is a good rule.

Also, when you are going back into Government, you are recused from dealing with anyone who has given you revenue, whether you

were employed by them full-time or were consulted or gave a speech to them or wrote an article for them or whatever, for at least a period of a year. So I think all of those are important tools.

I also think that the OIG is one arrow in the overall quiver of ways to prevent capture, so OIRA, which I am not sure I would call it necessarily a super cop, but OIRA looks at each regulation from a more macro perspective. The OIG looks at personal malfeasance often, violations of ethics rules, and I think that is very important. ACUS, as Professor Shapiro was saying, is more of a think tank and has more of a generalist approach without looking at the specific regulations per se. So I think you want to have a lot of arrows in your quiver in trying to fight against capture.

Senator FRANKEN. Professor Shapiro.

Mr. SHAPIRO. Thank you. I am not sure I am sanguine about OMB and its role as kind of an independent adviser to Congress. OIRA, because of its economic perspective, has a very narrow sort of way of looking at regulation, and there are some very good empirical studies out there showing by and large most of the time it opposes stringent regulation on economic grounds.

So I am not sure they have as broad a perspective as Congress might want, but you have your—I mean, I think Congress ought to control that, and the GAO would seem to be a perfect vehicle for more monitoring, and it is within your control. It has a fabulous record of professionalism, and you can direct it, and that is where I would put it.

To answer your question, Senator, it seems to me the revolving door most of the time involves senior managers who were political appointees, and perhaps the best defense against the revolving door is the career civil service, and they are not doing so well, partly because of funding cuts and other problems which have been well documented, and building up the career civil service, kind of speaking truth to power, I think is also a way of getting at it.

Senator FRANKEN. I have got a little bit more time. Professor Bagley, I believe you also wrote about the cultures of agencies, and I was just wondering if you had any advice for creating a culture for the new director at the Consumer Financial Protection Bureau. You are starting a new bureau there. How do you create the culture that you want?

Mr. BAGLEY. You need a dynamic, energetic, thoughtful, passionate leader of the organization to get it off the ground. I think that is absolutely critical.

Senator FRANKEN. I wonder who that could be.

[Laughter.]

Senator FRANKEN. Sorry.

Mr. BAGLEY. I think it is important that the agency be given adequate funding to hire good people because that person certainly cannot do everything he or she needs to do without good people around on the ground.

Really, it does come down, I think, to making sure that the agency receives the kind of political support from this body and from the House that it needs to get off the ground. The Consumer Product Safety Commission is a good analog, and the concern with the CPSC is that it just got forgotten. The real risk with a new consumer protection board in the financial sector, is that eventually,

2 or 3 years from now, we are going to be worrying about a different set of problems, and it is going to become politically not a worthwhile endeavor to oversee the agency carefully.

Senator FRANKEN. I think it was deliberately set up with a funding stream for that very reason.

Mr. BAGLEY. That is exactly right, and I think that protecting funding streams at other agencies that have been beleaguered is one way to resolve the capture problem. But making sure that the agency is adequately funded, well staffed, and staffed by a vibrant leader is extremely important.

Senator FRANKEN. Thank you.

Thank you, Mr. Chairman.

Chairman WHITEHOUSE. Just to respond to what you said, Senator Franken, esprit de corps I think has a lot to do with it. You see wonderful esprit de corps in the military. Within the elite units of the military, you see it even more pronouncedly. I noticed it during my time at the Department of Justice. That is a group of individuals who take enormous pride in the institution that they serve, and one of the demonstrations of it was that episode that we heard about in this Committee, in the Judiciary Committee, when the President of the United States and the Vice President in the White House put immense pressure on the Department of Justice to approve the warrantless wiretapping program when Deputy Attorney General Comey and Attorney General Ashcroft had reached the determination that it was not, in fact, lawful. And that went to a face-to-face confrontation between the President and the Acting Attorney General in the White House and led to that bizarre scenario of the White House Counsel and Chief of Staff going to visit Ashcroft in the hospital as he was significantly disabled by his illness, and the head of the FBI and the Deputy Attorney General, Acting Attorney General, both racing with their lights on to the hospital with instructions called ahead by the FBI Director to his FBI agents guarding the Attorney General of the United States saying, "Don't let the Attorney General of the United States be left alone with the White House Counsel and the White House Chief of Staff." It was almost an episode from a country other than ours.

Senator FRANKEN. Well, it looked like "The Godfather," Michael moving his Dad.

Chairman WHITEHOUSE. Yes, but that kind of thing shows that intensity of esprit de corps and the fact that not only was Comey willing to step down if the pressure came on from the White House, but six or seven of the senior members of the Department of Justice were willing to resign with him to show that they simply are not—that "This is an organization that you do not mess with, Mr. President, and now you are messing with us." That kind of a spirit I think is important to——

Senator FRANKEN. But if I may, I think we did see that Department later in that administration deteriorate to the point where they were doing some things——

Chairman WHITEHOUSE. With the U.S. Attorneys.

Senator FRANKEN. Yes.

Chairman WHITEHOUSE. It is not bomb-proof, but I think esprit de corps matters.

I wanted to touch base on a couple of the things that, as you said, there are a whole bunch of different vehicles—I think everybody has said this—through which regulatory capture can take place. Some are pretty obvious and pretty obviously, you know, either unlawful or reprehensible or in violation of ethics rules: direct financial inducements to people, trips, travel, free meals, all that sort of stuff. You can get at a certain amount of that just through the ethics laws and reporting. It still happens. It is one device. But it has its own way of trying to stop it.

Then you have got the revolving door problem, which is both revolving industry folks in and then for the folks who are in, holding out the inducement that they can revolve out to a cushy job in the industry.

Then you have got the problem of the ability of a highly motivated and very wealthy participant in the process to simply swamp the regulatory process, just bury it, so that public sector enterprises that do not have those same resources and that have to spread their resources across a variety of issues simply cannot keep up, and they just get left behind by the sheer expenditure.

Then you have got the sort of gentle cajoling of "If you do it my way, everything is going to be fine, and we can move on to something else. And if you do not, well, you know, we are going to take you to court and you are going to have to testify and there is going to be litigation and it is going to slow you down and people are going to complain. Do it my way. Let us just be nice about this."

That gets very hard to pick out because, frankly, that is very legitimate behavior, and you really have to sort of go into the motivation, into the mind of the person who is pursuing those strategies to determine whether there is an abuse of the process or a legitimate use of the process.

Then there is the whole issue of political interference. Do you get your budget cut if the White House is mad at you because you are not playing along with their folks? Do you get your budget cut because Congress is mad at you because you are not playing along with their folks? Are you getting calls from the chief of staff giving you hell about what you are doing or encouraging you? Do you get flown home on Air Force One and get your picture taken with the President? You can put it on your desk and show how important a person you are if you go along with the program.

I mean, there is just this whole array of threats and inducements, and it strikes me that trying to go at this problem by trying to identify all those different vectors for regulatory capture and manage each one of them on the input side may be very challenging and that you may want to look at the output side. Again, that creates its own measurement and metrics problems, but basically what is coming out of this agency? Is it really doing its job? Are you seeing continued casualties from cranes, you know, and look to the result that you are seeking, is that a good metric trying to bring to this equation? Or is it too vague, do you think? Professor Shapiro.

Mr. SHAPIRO. No, it is not going to be easy. But at the moment we do not do it at all, so it is surprising what sometimes is basic level information, what that can reveal. And because we are not capturing that information in any kind of straightforward way and

making it accessible—this information, if we could come up with some decent metrics—and that would be hard. You could put it on the Web. Citizens could follow this. You know, is the thing going up or is it going down? And it would be misleading. I mean, there is no metric that is going to capture perfectly what is going on. But that would not be the aim. The aim would be to have some basic indicators that are at least accurate enough to suggest whether the agency is moving forward and trying, despite various hurdles, to do its job or whether it is not doing anything. And if we could tease out those metrics, I think that would be helpful.

Mr. BAGLEY. I think looking at outputs is certainly important. That is what we care about. And if we were able to measure effectively whether those outputs were skewed by industry group pressure, we would care a lot about that. But I am a little skeptical that in every case we are going to be able to do that.

And just as you would not try to figure out if somebody had committed a bank robbery by looking at just whether or not he had a big influx of cash, you would instead ask: What was he doing on the day of the bank robbery? You might want to look at the inputs. You might want to find out both parts of the story before you started casting stones about agency capture.

I go back to a point that I made in my testimony, and I think to me it strikes me as a promising avenue, which is doing your utmost to eliminate the conditions in which capture can thrive as opposed to trying to put the genie back into the bottle once it comes out. And there are several techniques and approaches you can employ to do that. One is enhance the prestige of Government employment and enhancing the kind of esprit de corps that is an enormous bulwark against capture. You can look at the structural infirmities of agencies and their funding streams. And you can take steps to enhance the ethics restrictions and close the revolving door.

But I am not sure why you would exclude anything from your examination of the problem. It is a multi-faceted problem. For one example, we first learned about the problems at MMS not because of outputs, although we had one very large output recently, but we first learned about the problem because of inputs and reports that arose out of Colorado about inappropriate contacts between oil industry and the people who were managing the leases.

So we will want to think about all aspects of the problem as you move forward. It is a tough problem, and we do not want to artificially limit ourselves.

Chairman WHITEHOUSE. But adding outcomes measurement, to the extent it——

Mr. BAGLEY. Absolutely.

Chairman WHITEHOUSE.—would be a valuable addition?

Mr. BAGLEY. Sure.

Chairman WHITEHOUSE. Senator Franken.

Senator FRANKEN. Well, you were just mentioning esprit de corps, Professor Bagley, and when I made my impromptu opening statement, I talked about some things that happened during the—that I saw that happened during the Bush administration, where I think esprit de corps seemed to be hurt in a number of agencies. I talked about FEMA and what appeared to be—and I think it is

hard to argue with the perception that there was cronyism going on there. And to the extent that so many of the people that were selected to do regulation in the Interior Department were lobbyists who had come directly from the industries that they were now regulating, what is the effect of that kind of cronyism on the esprit de corps within an agency?

Mr. BAGLEY. It can be devastating, as reports about the Civil Rights Division of the Department of Justice attested to. There were many, many members of that Division who felt like the mission of the agency had been distorted. There are many who disagreed with that assessment, but I definitely know that on the ground there was a loss of confidence and faith in the agency as an institution. This is troubling given that esprit de corps and the cohesiveness of an agency are important bulwarks against industry influence, against passivity, against sclerosis, against a host of well-known agency pathologies. We would certainly want to pay attention when, for whatever reason, an agency started to look sick, especially when the civil servants start revolting. You saw this at a number of agencies during the last administration, and that should be a canary in the coal mine for Congressional overseers.

Senator FRANKEN. And why did that happen in the last administration? I mean, you were also talking about funding, and I think there was de-funding of certain agencies during that period. And is there—if an administration and the Congress have sort of an anti-regulatory bias and are assigning people to head—the political appointees to the agencies who really do not want the agency necessarily to do its job, what happens then to the esprit de corps in the agency and what happens to the effectiveness of the agency? I will ask that of Professor Shapiro and then of Dr. Troy.

Mr. SHAPIRO. Thank you, Senator. I guess I am going to disagree a little with Dr. Troy. He earlier described the staff as being biased toward the implementation of their statute, and to some extent that is true. I mean, if you go to work for EPA, you should be in favor of doing what EPA is supposed to do. But I think the empirical evidence shows by and large what is called neutral competence, that lawyers perform like lawyers and give candid advice to the political managers just in the way we would expect lawyers to do that, and scientists try to present the scientific evidence just as they have been taught to do when they get their Ph.D., which is to be as fair to the evidence as possible.

So when you have a robust, effective career staff who were highly professionalized, then we get a kind of speaking truth to power that is a kind of protection against the revolving door and against political managers who would want to tilt the agency in a certain way because the staff is presenting them with evidence.

Now, they may ignore the evidence, and if they do——

Senator FRANKEN. Didn't we see scientific language change in that period?

Mr. SHAPIRO. Yes.

Senator FRANKEN. And is that an anomaly, or is that something that has happened frequently in the past?

Mr. SHAPIRO. Fortunately, I think it was an anomaly, although it was—there were lots of examples of that, unfortunately, from the last administration.

Senator FRANKEN. OK. Dr. Troy, I will give you a chance to respond.

Dr. TROY. First of all, I would like to just clarify what I was saying with Professor Shapiro. What I said is not that the career staff is biased toward the implementation of their statutes but toward the prerogatives of their agency and toward making sure that their agencies are not embarrassed. And to the extent that there is malfeasance in any administration or in any organization, I think that is harmful to the esprit de corps at an agency, and I think you in your remarks, Senator Franken, said that the problems of political appointees are not unique to any one administration, that sometimes you have bad actors. But overall I thought that the administration had very high standards for employing people, and generally the esprit de corps was very good. But when you do have problems like the ones that we have been talking about, malfeasance definitely can negatively impact the esprit de corps.

Senator FRANKEN. Thank you.

Thank you, Mr. Chairman, for this hearing.

Chairman WHITEHOUSE. Thank you.

There is one point I would like to come back to that Professor Shapiro made. I assume we will agree on some limitations around the point you made, but you said, in effect, that when a new President is elected, then there is an ability and a proper ability on the part of that President to bring their own political point of view, the one they were elected with, into the agency process. And I will concede that that is true, but I would also suggest that there is a floor below which that executive policymaking discretion cannot go.

Mr. SHAPIRO. Absolutely.

Chairman WHITEHOUSE. And that that floor is one that is set by Congress when it passes a law and makes it the law of the United States of America that an agency shall or shall not take on a certain function, adhere to a certain standard, and so forth.

Mr. SHAPIRO. I agree completely. I think there is a world of difference to a conservative administrator at OSHA adopting regulations to protect workers that might not be quite as robust as, say, the unions want but still are well within the legality of the statute; and an administrator at OSHA who stalls regulation for the 2 or 3 or 4 years that she or he is in office and nothing comes out; or an administrator who simply makes it impossible or very difficult for the agency to enforce the regulations that are then on the books. That is not a difference of policy. That is stonewalling.

Chairman WHITEHOUSE. Well, if anybody would like another round, I am happy to accommodate my colleagues, but we are close to closing time, and I wanted to put a few things in the record. I want to in particular thank the witnesses. I think that each one of you has been very helpful and has brought an important perspective to this hearing.

My personal feeling is that this problem of agency capture deserves a great deal more attention than it is presently getting, and that given the constant pressure of industry in particular, although not necessarily, on these agencies and the organizational power mismatch and the huge stakes both in the short run, if you could win with the agency, and even greater consequences if the agency's failure results in a massive public catastrophe. We have known

about this for decades. It is a recurring problem. There is no consistent, institutional, thoroughgoing vehicle for counterpressure. And I view this as an opening hearing that has tried to raise the profile a little bit of this agency capture phenomenon, look into its elements and its nature, the sort of topography of the problem, and begin to learn our way around it with a view that in future hearings and in future legislative efforts we can try to build an apparatus in Government that allows for adequate counterpressure so that the bubble goes back to the center rather than being pushed way over by all the pressure coming from ordinarily the industry, but I take Dr. Troy's point that it is not necessarily the industry.

You know, I came out of a Foreign Service family, and I went to a lot of crummy and dangerous places as a kid, and the message that I took from that that my father and my mom were willing to take us there is that there is something more about this Government than just the convenience of, you know, the average American, that we stand for something. Everybody who serves in uniform in this country or has a family member serving in uniform understands that there is something that is extraordinarily important about the Government of the United States.

If you look at our history, this is the Government of George Washington, of James Madison, of Thomas Jefferson. It is the Government that Abraham Lincoln served, that Theodore Roosevelt served, that Franklin Roosevelt served, that John F. Kennedy served. It is an institution on this planet that is probably the greatest force for good on the planet, probably the greatest force for good ever on the planet. And the notion that some industry or some other private entity with a special interest could creep its way into the very fabric of that Government and take an agency of that Government and turn it away from the service of the public, away from the service of the country, away from the best interests of the United States of America and co-opt it to become its servant is to me very, very deeply offensive. That is something that everyone in America should be concerned about, upset about. And we talk about zero tolerance in other contexts. There really ought to be zero tolerance for that. The Government of the United States of America ought to serve the United States of America, and so I am pretty highly motivated to try to at long last begin to craft a solution to this problem. And as I said in my opening statement, if the financial meltdown and the catastrophe that we have suffered across this country has not taught us something about the importance of protecting our agencies against regulatory capture, if what happened in the Gulf has not taught us something about that, my gosh, are we ever slow learners.

And the fact that these two have gone off does not mean that that is the end of it. It does not mean that there are not other agencies just as co-opted as MMS was, just as co-opted as the Securities and Exchange Commission was, where it simply has not blown up yet. And so I think for us to be about our business of trying to get this right and prevent those next disasters from happening, where the constants are always there, the constants of the pressure, the constants of the superior ability of the insiders, the constants of the massive transfer of wealth that is possible from

successful agency capture, all of that does not go away. And we simply have to step up and be ready for it.

As I said, this is an opening episode. I think the witnesses, each of you, have been extraordinarily helpful, and I really appreciate what you have done.

I have a couple of things I would like to put in the record, if there is no objection. One is the statement of our colleague, Senator Feingold, who has put in a wonderful statement with a particular focus that has been developed a bit in this hearing, but that he focused more on, which is how this plays out in terms of our increasing reliance on Government contractors. He cites the Council of the Inspectors General on Integrity and Efficiency reporting recently that the total number of suspensions and debarments in fiscal year 2008 was half the total from 5 years previously and that suspensions and disbarments had been steadily decreasing over the last 5 years. So up in terms of the amount of Government contractors, up in terms of the money we spend on Government contractors, down in terms of suspension and debarments, which are at least one measure of whether we are looking at them. So I appreciate Senator Feingold's statement, and that will be added to the record without objection.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman WHITEHOUSE. Wendy Wagner, who is the Worsham Centennial Professor at the University of Texas School of Law, has provided important testimony that has helped support what I mentioned earlier about the capacity for insider players to overwhelm agency procedure. She describes, "For example, because the agency must respond to all comments, administrative law allows stakeholders with time and energy which generally, but not always, consists primarily of regulated parties, to effectively capture the agency by controlling their agenda, the framing of problems, the supply of information, and the issues on which the agency will be held accountable in the courts. Indeed, as this form of informational capture becomes more prevalent, it increases the costs of a rulemaking to the extent that only the most expert insiders can follow and process the information relevant to agency decisions."

She goes on to say, "Aggressively gaming the system to raise the costs of participation ever higher will in many cases ensure the exclusion of agency watchdogs that lack the resources to continue to participate in the process." And I thank Professor Wagner for her testimony, and that will be added to the record.

[The prepared statement of Ms. Wagner appears as a submission for the record.]

Chairman WHITEHOUSE. Hope Babcock, who is a professor of law at the Georgetown University Law Center, teaching courses in environmental and natural resources law, has offered testimony: "If agencies allow themselves to become servants of the interests they are mandated to regulate, then their capacity to make balanced and broadly informed decisions is seriously compromised." And she has some good suggestions on how to make the process more transparent so that particularly adjudicatory licensing hearings and their heavy resource burden on public protestants are not used to keep the public participants out.

[The prepared statement of Ms. Babcock appears as a submission for the record.]

Chairman WHITEHOUSE. The Consumers Union has provided a helpful statement, particularly with respect to the National Highway Traffic Safety Administration, what they describe as an "agency with a revolving door of regulators who left the agency to work for Toyota in safety matters before the agency," obviously relevant to the safety concerns we have seen recently about the Toyota automobiles.

[The prepared statement of Consumers Union appears as a submission for the record.]

Chairman WHITEHOUSE. Professor William Snape has offered his statement from the Center for Biological Diversity at American University's Washington College of Law. He notes, "A powerful combination of agency and industry rhetoric results in a deceiving mainstream 'view' that the agency behavior at issue is either desirable or inevitable until the bubble literally bursts; e.g., we must increase oil drilling for national security, or the market will self-correct any artificial inflation of stock, bond, or derivative price." And he cites Judge Posner for some of his testimony.

[The prepared statement of Mr. Snape appears as a submission for the record.]

Chairman WHITEHOUSE. Roger Williams University, my home State law school, has a statement from Dean David Logan, who teaches administrative law and tort law and sees regulatory capture as a problem that takes away from adequate public decision-making. His phrase is that it leads to "serious corrosion of the regulatory system."

[The prepared statement of Mr. Logan appears as a submission for the record.]

Chairman WHITEHOUSE. And, finally, Professor Daniel Carpenter at the Harvard University Center for American Political Studies—he is the director there and the Allie S. Freed Professor of Government—writes to say, "Let me say that I believe this issue to be one of the most vital policy issues of our times, perhaps the single most salient regulatory issue facing our Nation for the next 10 to 20 years."

[The prepared statement of Mr. Carpenter appears as a submission for the record.]

Chairman WHITEHOUSE. So I thank all of them for participating in this hearing through their written testimony. Since this is an ongoing process, we will continue to be in touch with them, and I want to particularly thank Senator Kaufman, who has been called away to his responsibilities at the Armed Services Committee, and Senator Franken for participating in this. As observers of this Committee will have seen, they are two of the brightest and most thoughtful and most sort of trenchant in their thinking Members of the Senate. The fact that they chose to spend their day with us, their morning with us today I think has been very valuable and helpful and instructive. So, Senator Franken, thank you very much.

The record of this hearing will remain open for one additional week for anybody who wishes to add anything to it. And, again, I thank our Ranking Member, Senator Sessions, for allowing us to

proceed in his absence. We understand perfectly that, given the nomination of your Supreme Court Justice's successor, Professor Bagley, he has important work on the floor and an important meeting at the White House and, of course, it is perfectly understandable that he would be there rather than here. But he has been very courteous about working with us on the hearing and about allowing it to proceed in his absence, so I thank Senator Sessions as well.

If there is no further business of the Subcommittee, we will stand adjourned. Thank you all very much.

[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

GEORGETOWN LAW

Hope M. Babcock
Professor of Law

August 2, 2010

**VIA ELECTRONIC MAIL**

Re: Statement of Hope M. Babcock to the August 3, 2010 Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts Hearing on "Protecting the Public Interest: Understanding the Threat of Agency Capture"

Dear Senator Whitehouse:

Allow me to introduce myself. I am a professor of law at the Georgetown University Law Center where I teach courses in environmental and natural resources law and am also a director of the Institute for Public Representation (IPR). IPR is a clinical education program and public interest law firm at the Law Center where students work on projects on behalf of individuals and organizations who could otherwise not be able to secure legal representation. Before coming to Georgetown I served as General Counsel of the National Audubon Society and as a Deputy Assistant Secretary for Energy and Minerals in the Department of the Interior during the Carter Administration. While at Interior I had responsibility for developing the Department's energy and minerals regulatory programs, including those implementing the Outer Continental Lands Act Amendments and the Surface Mining Control & Reclamation Act. I also served on the Clinton-Gore Transition Team for the Department of Interior. Before my service in the government, for nearly eight years I represented utilities seeking licenses from the Nuclear Regulatory Commission. I started that practice coincident with the passage of the National Environmental Policy Act, the Clean Air Act, and the Clean Water Act. I have taught environmental and natural resources courses at Pennsylvania, Yale, Pace, Catholic, and Antioch law schools, and have published numerous articles in scholarly journals on environmental and natural resources law, environmental justice, environmental clinics, Indian sovereignty, personal and corporate social responsibility for environmental harms, the public trust doctrine, and state sovereign immunity. This background provides the basis for the brief remarks contained in this letter, which I submit in response to your request, and which I ask that you include in the hearing record.

The topic of this hearing is extremely important. If agencies allow themselves to become servants of the interests they are mandated to regulate, then their capacity to make balanced and broadly informed decisions is seriously compromised. By predominantly, or even solely, relying on regulated entities as a source of information about the potential risks of their activities or their costs and benefits, agencies lose their capacity to think independently about what is in the public interest and stop seeing themselves as servants of the public whose interest they are legislatively directed to protect. In that sense, the agency has been captured by the interests that it is mandated to regulate. An agency that simply agrees to what a regulated entity proposes,

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sometimes in meetings that are closed to the public, or agrees to streamline the regulatory process, thus limiting opportunities for public dissent, short-circuits public review. Many scholars have concluded that public participation in agency decision-making is critical to gain public confidence in the agency's actions as well as to prevent agency capture. By tilting its decisions more towards meeting the interests of the industries it regulates as opposed to achieving a balance between those interests and environmental protection and public health and safety, agencies are defying congressional mandates that appear in most environmental and natural resources statutes.

There are many reasons that agencies become "captured" by the industries they regulate. Factors that contribute to this happening include:

- the revolving door phenomenon, which enables agency and industry personnel to rotate jobs;
- the imbalance of resources between regulator and regulated industries, which leaves agencies without the resources to counter industry factual or theoretical assertions;
- the difficulty of establishing that some proposed regulated entity's action is unsafe under often vague and ambiguous statutory standards;
- the appeal to overworked and under-resourced agency personnel of using industry's information and analyses instead of developing that information independently;
- the reluctance of agency staff to incur political wrath by doing something that thwarts the desires of powerful industry representatives.

Lack of public and political support for any agency's broad-based mission can leave it vulnerable to pressures from regulated interests to service their narrower interests. Once an agency starts to serve the interests of regulated interests, a culture can develop within that agency that this behavior is the norm. Doing something different becomes suspect. Deviating from the norm requires more effort, which is never popular among overworked agency staff, and can generate internal criticism, loss of prestige, loss of resources, and even loss of the staff member's job or her transfer to another office.

Most of these reasons can explain agency staff reliance on regulated interests to make their job easier and less unpleasant. However, none of these behaviors is justified when carried to an extreme agency personnel lose their capacity or willingness to gather and evaluate independently the information before them and lose the capacity to make independent judgments. This behavior constitutes agency capture, several instances of which I observed during my time in the government and at National Audubon.

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For example, while at National Audubon, I heard from our program staff and staff in other environmental and conservation organizations about the difficulties they were having arranging meetings with the staffs of various agencies. I also heard that when such meetings occurred they were short and very little information was exchanged. The result was that we stopped trying to meet with agency officials. I also know from personal experience when I was in the Department of Interior that we met frequently with public interest organizations and members of the public and received a steady stream of information from them. Also at Audubon, I reviewed detailed, well-supported comments filed by our program staff and other environmental and conservation organizations, which were ignored by agency staff. Courts frequently overturned these agency actions, which almost overwhelmingly favored industry's interests, because the agencies failed to respond to our concerns. By way of contrast, the regulations we issued in 1979 implementing the Surface Mining Act contained 500 pages of preamble explaining the basis and purpose for our decisions. I observed nothing comparable during the Reagan or Bush Administrations. While at Audubon, and later at IPR, during those Administrations, I frequently had to use the Freedom of Information Act to pry loose information about meetings between agency staff and representatives of regulated interests. That information was not otherwise available in the agencies' public records.

There are various ways to protect against agency capture, for example by:

- tightening the rules barring the movement between agency and regulated industry personnel;
- requiring that meetings between agency staff and regulated interests are open to the public or that a record of those meetings is available to the public;
- having agencies implement a policy that whenever their staff meet with representatives of regulated interests they subsequently meet with members of the public who have opposing views;
- having agencies institute a process whereby the agency's Inspector General would be informed regularly of meetings that agency personnel have with regulated interests so that corrective steps could be taken if necessary;
- making greater use of advisory or review committees, like the Atomic Committee on Reactor Safeguards at the Nuclear Regulatory Commission, to oversee significant agency regulatory decisions before they are made;
- encouraging agencies to develop a culture of independent and balanced regulation through the development of training programs.

With respect to the latter suggestion, while I was at Interior I observed the successful efforts of the Director of the Bureau of Land Management, with Secretarial approval, to change the culture of that agency from one that was commonly viewed as "in bed" with the cattle industry to one that rigorously reviewed grazing permits. This was accomplished by hiring new, young staff with degrees in environmental management and an enthusiasm for environmental protection, by

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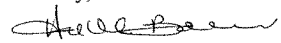
moving resistant staff to non-regulatory positions, and by instituting training sessions in environmental management. While many of these changes may not be suitable for legislative implementation, active congressional oversight of departmental secretaries and agency directors could help insure that agencies are undertaking these and similar steps.

One proposal made when the Department of Interior was considering ways to reorganize itself to make more logically coherent its many disparate functions was to separate out and put into a single office the Department's regulatory and permit issuing/enforcement functions. That office would report directly to the Secretary. The goals of the proposal were to separate the regulatory functions from the intermediate supervision of political appointees, elevate their importance in the Department by having the office report directly to the Secretary, and put like-minded people with similar responsibilities together so they could learn from and support each other. The proposal was not accepted. I still think it was a good idea. I believe that the proposed restructuring would have improved the regulatory culture at the Department and protected regulators from unwarranted intermediate political influence, and is, therefore, worth this Committee's consideration.

I am currently studying the regulatory regime at the Nuclear Regulatory Commission and comparing it to the Interior Department's regulation of offshore oil and gas operations. Both are risky ventures from the environmental and health and safety standpoint. Although I am at a very preliminary point in this research, I find it interesting that the NRC, largely in response to the accident at Three Mile Island, appears to have changed its licensing procedures so that they are more open to the public and less controlled by license applicants. The agency has initiated a policy of holding informal public meetings, for the express purpose of explaining to the public the safety and environmental aspects of an application, the regulatory process, and future opportunities for public participation in the formal licensing process. The Advisory Committee on Reactor Safeguards also conducts a public meeting to review staff findings on individual applications before it makes its recommendation to the Commission. The Commission has moved away from adjudicatory licensing hearings, which placed a heavy resource burden on public protestants, and has instituted a policy of mandatory disclosure of documents, including all relevant regulatory correspondence. These latter changes should make the Commission's work more publicly transparent and less susceptible to capture by the nuclear industry.

Thank you for the opportunity to submit these comments. I hope that they will be helpful. I commend you for holding this important hearing. If I can assist you in any other way, please do not hesitate to ask.

Sincerely,



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**Statement of Nicholas Bagley**
**Assistant Professor of Law**
**University of Michigan Law School**

**Protecting the Public Interest:**
**Understanding the Threat of Agency Capture**
**Before the Senate Subcommittee on Administrative Oversight and the Courts**
**August 3, 2010**

Mr. Chairman and Members of the Subcommittee: It is an honor to have been invited to testify before you today about agency capture.

In principle, agency capture is a simple concept: we say an agency is "captured" when it caters to narrow, private interests at the expense of the public welfare. As my testimony will explore, however, agency capture is, in practice, much more complicated than that. On the ground, capture can look a lot like cooperation, and it is often very hard to figure out whether an agency's accommodation of private interests furthers the public interest. Even when we are confident that an interest group has exerted untoward influence over the regulatory process, the manner in which it has brought that pressure to bear will vary dramatically from agency to agency.

Understanding the complexities of agency capture can help train our attention on the myriad ways that narrow interest groups can twist an agency's priorities and subvert its public-regarding mission. A nuanced understanding of capture also suggests that reducing the risk of capture at any given agency will require close attention to political and regulatory context, and that no silver bullet will provide a comprehensive solution to the problem. It is nonetheless essential that we take steps to address capture, which remains prevalent within the regulatory state and which saps the effectiveness of federal agencies. Eliminating capture—and with it, the distorting influence of special-interest groups on the federal bureaucracy—should be an urgent priority.

## I. An Intellectual History of Agency Capture

The modern conception of agency capture grew out of public choice theory, an analytical framework for understanding politics that draws heavily on economic models.[1] Public choice theory posits that legislators are rational actors concerned only with maximizing their chances at re-election and not at all with the public interest. Under this jaundiced view of the world, legislators are assumed to do whatever they can to curry favor with those interest groups that can provide them with the money and support they need to stay in office.

[1] For a terse and illuminating discussion of the contours of modern public choice theory, see JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 10-21 (1997).



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The trouble is that not all interest groups are created equal. Advocacy groups are organized more easily and operate more effectively when each member of the group stands to benefit greatly from the group's efforts and when the group's membership is small. If I run a coal-fired power plant, for example, it will probably be worth my while to coordinate my lobbying activities with other members of my industry. Tightly focused groups representing concentrated interests—normally corporations—are therefore quite likely to form and to bring substantial pressure to bear on legislators.

In contrast, groups that aim to procure a public good for a large and diffuse bloc of people are much harder to organize. Any individual member of the group would benefit equally from the group's advocacy efforts, whether or not she spent her time and money helping to organize the group. As a result, no individual will have an adequate incentive to organize a group, even if everyone would be better off if they could coordinate their political activities.[2]

For example, I might prefer to have cleaner air than we do. I am nonetheless very unlikely to devote myself to forming a group to agitate for change. Any benefits of the group advocacy would accrue to everyone in the country—not just those who donated or worked for the cause—and my quality of life would improve only marginally. Buying a plasma screen television would probably give me more bang for my buck. Because every individual is going to face similar incentives, organizations demanding public goods are less likely to form and, when they do form, will probably be unwieldy and not particularly effective.

These are gross generalizations, of course. Some groups representing diffuse interests are politically potent; the National Rifle Association is one example. And some industry groups cannot get their acts together to lobby effectively. But the public choice story captures an important dynamic that finds ample support in the empirical literature: groups representing narrow interests will consistently outmatch those representing broader interests in the legislative process.[3]

Public choice theory thus suggests that legislators will be more attentive to private interest groups than to the public at large. This brings us back to agency capture. As originally conceived, capture theory involved three actors: an agency, the congressional subcommittee that oversaw the agency, and the industry regulated by the agency. In order to secure favorable regulations, industry would aggressively lobby subcommittee members and provide support, financial or otherwise, for the members' reelection efforts. Those subcommittee members would then lean on the agency to do the industry's bidding. Because the rest of Congress would be oblivious to the activities of the subcommittee or the agency, this "iron triangle" could consistently further industry's narrow desires at the expense of the public interest.[4]

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[2] *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

[3] *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1286-89 (2006).

[4] *See* LAWRENCE C. DODD & RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 103 (1979).



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For public choice theorists, the iron triangle offered an explanation for why "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."[5] On this account, industry would procure regulations that would allow it to prevent new competitors from entering the market—including new firms that could be more efficient or innovative. Prime examples of these sorts of captured agencies were the Interstate Commerce Commission and the Civil Aeronautics Board, which consistently acted to protect the railroad, trucking, and airline industries.[6]

Although the iron triangle story was elegant and attractive, it was not altogether clear that it explained very much about the way that most agencies actually functioned.[7] During the 1970s and 1980s, moreover, Congress eliminated much of the direct economic regulation upon which the iron triangle theory rested. In its place, Congress enacted a raft of health-and-safety statutes that applied across the economy, including the 1970 amendments to the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, and others. It suddenly became much more difficult to sustain the argument that federal regulations were acquired by industry for its benefit.

As the regulatory ground shifted, capture theory began to embrace several "more subtle explanations of industry orientation."[8] These explanations also rested on the insight that industry groups will have enormous organizational advantages over the dispersed public in advocating for their preferred regulatory outcomes. The guiding assumption, however, was no longer that federal agencies would dispense regulations aimed at coddling existing industries at the expense of new firms (although they might sometimes do that). Instead, the influence of regulated entities would operate more generally to limit the scope and soften the severity of agency actions. Agency capture was not just about preventing new competitors from emerging; it could plausibly infect any feature of agency decision-making.

The revised model also discarded the iron triangle as the basis of capture theory. Instead, commentators looked at the various ways that industry groups might directly co-opt an agency. For example, most agencies must of necessity cooperate with the entities that they regulate in order to procure needed information, political support, and guidance. Sometimes that cooperation can slip into capture. Agency officials might get distorted information from the regulated industry; they might want to avoid the political or legal firestorm that would engulf their agency if they targeted a powerful interest group; or they might just start to see the world the way that industry sees it. A capture born of cooperation may be more prevalent at independent agencies[9] or at agencies that are inadequately staffed and funded.

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[5] George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

[6] *See* Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 498 (1952) (noting that the Interstate Commerce Commission had come to accept "'public interest' and 'railroad interest' as synonymous terms"); Bradley Berhman, *Civil Aeronautics Board*, in JAMES Q. WILSON, ED., THE POLITICS OF REGULATION (1980).

[7] *See* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 336-37 (1974) (arguing that there are "significant weaknesses in both the theory and the empirical research that is alleged to support the theory").

[8] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1685-86 (1975).

[9] *See* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 282-87 (1955).



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Another frequent culprit in the capture story is the "revolving door" between agencies and the industries that they regulate.[10] Agency officials often come from the private sector and may plan on returning once they have completed their stints as government employees. They may therefore share a common perspective with industry; they may have close personal relationships with members of the industry; and they may be reluctant to regulate aggressively if doing so would jeopardize the prospect of securing future employment. The revolving door can also work in reverse. A former agency official working for private industry will know the pressure points within an agency—whom to call and how to make her case—and may be able to leverage the relationships she formed while in government service.

Regulated industries are also well-positioned to monitor agency behavior closely, providing them with an additional set of advantages in the regulatory process. They can make their influence felt either at the agency, the White House, or on Capitol Hill; they can devote resources toward commenting on notices of proposed rulemaking; and they can afford to file suit in an effort to gum up the works of agency decision-making. As compared to public-regarding groups that might push an agency to regulate more aggressively, regulated entities are much better-positioned to intervene early and often to delay or squelch agency decisions that might harm their bottom line.

In short, this revised capture model—a model that is sometimes described as interest group "domination"[11]—offers an adaptable account of how agencies might fall sway to industry influence. The model has proven enormously influential. As one prominent commentator observed more than thirty years ago, "[i]t has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests."[12]

## II. Cautionary Notes About Capture

Although agency capture offers a compelling story about how some agencies operate some of the time, it is also a crude stereotype about agency behavior.[13] Some agencies succumb to industry group pressure, but most resist it admirably. Yet the capture story is so adaptable and makes so much intuitive sense that any foolish decision by an agency can readily be chalked up to capture. This is problematic. Casual application of the capture label can obscure rather than illuminate the bureaucratic dynamics that lead to the subversion of an agency's mission. And that, in turn, can complicate efforts to remedy agency capture where it does exist.

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[10] KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 342 (1986).

[11] Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 459 (1999).

[12] Stewart, *supra* note 8, at 1713.

[13] SCHLOZMAN & TIERNEY, *supra* note 10, at 346 ("In short, capture theories are simplistic as a description of the relations between organized interests and the agencies to which they are attentive.").



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The central problem with agency capture is that it is neither easily identifiable nor readily falsifiable. Let me explain what I mean. To decide whether capture has occurred, you would first want to know what a regulated industry has done to pull the levers of influence at an agency. Although the industry-agency contacts will occasionally be inappropriate enough to suggest untoward influence, most of the time they will involve altogether innocuous meetings, phone calls, and emails. So you will have to examine what the agency has done. Has it declined to exercise its enforcement authority? Has it watered down regulations at industry's behest? Has it declined to regulate altogether? Even if it has, that is still not enough. The agency might have had good reasons for doing what it did. The crucial inquiry remains: would the agency have more zealously performed its duties in the absence of pressure from regulated interests?

Most of the time, it will be impossible to know the answer to that question. Isolating the various motivations that animated a particular agency decision is hard enough. Showing that the one that made a difference was the desire to cater to industry is another matter altogether. (The problem is similar to trying to figure out whether political donations have corrupted a legislator. Money may sometimes buy influence, but it is very hard in all but the most blatant cases to know for sure when it does.) The point is not that capture is impossible to identify; sometimes it is obvious. Recent Inspector General reports detailing deeply inappropriate contacts between some employees at the Minerals Management Service and representatives of the oil industry, for example, strongly suggest a capture dynamic.[14] But most of the time capture, if it in fact exists, will be much harder to ferret out.

For the same reasons that agency capture is not easily identifiable, however, it is also not readily falsifiable. Once an agency is tarred with an accusation of capture, almost any decision it makes to accommodate an interest group's concerns can be ascribed to capture. Even if its motives are pure, an agency will have a hard time proving its sincerity. No less than any other "[a]llegatio[n] of government misconduct," capture is "easy to allege and difficult to disprove."[15] There is thus good reason to be skeptical of claims of capture.

Skepticism is all the more warranted because not everyone who invokes agency capture agrees about what it means. For a good example, Christopher DeMuth and Douglas Ginsburg, two former administrators of the office within OMB that oversees agency rulemakings (and the latter now a judge on the D.C. Circuit), argued in 1986 that government agencies will inevitably regulate "too much" in part because pro-regulatory public-interest groups, through their superior organizational mettle, will capture those agencies.[16] The villains of DeMuth and Ginsburg's story are environmental groups like the Sierra Club, labor unions like the Teamsters, and consumer advocacy groups like Public Citizen. But DeMuth and Ginsburg's argument rests on a fundamental misunderstanding of public choice theory. Contrary to the story they tell, well-organized industry groups that stand to gain from a reduction in burdensome regulation will

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[14] *See* Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, N.Y. TIMES, Sept. 10, 2008; Noelle Straub, *Interior Probe Finds Fraternizing, Porn and Drugs at MMS Office in La.*, N.Y. TIMES, May 25, 2010.

[15] National Archives and Records Administration v. Favish et al., 541 U.S. 157, 175 (2004) (internal quotation omitted).

[16] Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) (same).



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generally have enormous organizational advantages over their public-interest counterparts when lobbying federal agencies. It is *those* groups that do the capturing, not the Sierra Club.

In DeMuth and Ginsburg's expansive conception, however, agency capture is not about the relative capacities of different groups to bring pressure to bear on an agency. For them, capture occurs whenever an agency's decision-making accords with the interests of an outside group, even where that group's aim is to secure a public good on behalf of the public at large. DeMuth and Ginsburg are not alone in using agency capture as a shorthand for their concern about how agencies choose to regulate. Indeed, I would venture to guess that allegations of agency capture more often reflect generic disapproval of agency behavior than an informed judgment that private groups have distorted the agency's decision-making.

Complicating the picture still further, what looks like capture at some agencies may actually reflect political dynamics that have little or nothing to do with the agency in question. During the 1980s, for example, many observers believed that EPA put the interests of industry ahead of its environmental mission. But that was in large measure because EPA was responding to the well-known ideological preferences of President Reagan. In the colorful expression of two commentators, "EPA was not so much captured by industry as donated to it by the Reagan administration."[17] When an administration's views about how an agency should operate align with the regulated industries' preferences, it can be difficult to disentangle whether the problem is capture, politics, or some unruly combination of the two.

My final cautionary word is perhaps the most significant. Although agency capture is both real and deeply problematic, "[c]apture is not by any means the norm, and where capture occurs, it does not always last."[18] Federal agencies are complicated places. They are shaped by deeply ingrained cultures; they have unique sets of strengths and weaknesses; and they are subject to a host of internal and external constraints.[19] Capture theory elides those complexities in an effort to make a general observation, but the theory's failure to account for complexity means that it will often lack explanatory force. Even where capture has been correctly identified as a problem, that is by no means the end of the inquiry. Only by understanding precisely why and how the agency in question has been captured will it be possible to tailor an appropriate response.

## III. Addressing Agency Capture

In arguing that we should be cautious about throwing around the charge of agency capture, I do not mean to invite complacency. Capture is a recurring problem in the regulatory state, and one that can have dramatic consequences. As the financial meltdown and the Gulf oil

[17] SCHLOZMAN & TIERNEY, *supra* note 10, at 346.

[18] *Id.* at 344. *See also* PAUL QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES (1981) (testing capture theory at four federal agencies and finding it wanting).

[19] *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 293 (1989) ("Government agencies are at least as complex and hard to understand as an exotic and distant native culture that a traveler has entered for the first time.").



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spill have both vividly demonstrated, addressing capture where is does exist is an urgent priority. In that spirit, I wanted to suggest a few general thoughts for guiding a legislative response.

Most significantly, the complexity of the capture pathology and the multiplicity of ways that private industry can divert an agency from its public-regarding mission should make us humble about our ability to devise a one-size-fits-all solution for agency capture. What works for one agency will not work at others, and a unitary solution could well impose serious costs on the smooth functioning of the regulatory state without substantial corresponding benefits. Solutions must instead be sensitive to the bureaucratic and political context in which agency capture takes hold.

Furthermore, the difficulty of identifying agency capture counsels against solutions that merely aim to eliminate capture once it occurs. More promising are legislative efforts to establish conditions in which capture is unlikely to take root in the first place. A coordinated attack on capture might focus on three different tasks.

First, addressing the structural flaws of certain federal agencies can help minimize the risk of capture. For whatever reason, some agencies are designed in such a way as to make them practically dependent on the industries they regulate. For one glaring example, the Office of the Comptroller of the Currency (OCC) and the now-defunct Office of Thrift Supervision (OTS) were both funded by assessments they impose on the financial institutions (national banks and thrifts, respectively) that they regulated. Because those financial institutions could choose to incorporate under various federal and state charters, they had an incentive to shop for the most attractive charter—normally the one that imposed the fewest regulatory constraints. The federal agencies' funding—their very existence—thus depended on making their regulations attractive to the entities that they regulated. Faced with that sort of incentive structure, it is not hard to understand why both OCC and OTS acted as the handmaidens of commercial interests and helped facilitate the reckless lending that led to the financial crisis.[20] Funding the agencies out of general appropriations rather than assessments would go far to alleviate any capture issues.

The same type of problem can arise when an agency lacks adequate funding and political backing to carry out its assigned mission. Industry groups find it relatively easy to dominate these forgotten step-children of the regulatory state, which have neither the resources nor the political backing to fend off the well-funded assaults of industry groups. For instance, a significant lack of resources appears to have plagued (and continues to plague) the Consumer Products Safety Commission, which has been "chronically understaffed" and has therefore "been no match for the industry participants it is charged with regulating."[21] At agencies like the CPSC, providing additional resources and ensuring that agency officials receive the political support necessary to do their jobs is essential.

Second, agencies are more prone to capture when they have conflicting responsibilities. To quote the Bible, "No man can serve two masters: for either he will hate the one, and love the

[20] *See* Nicholas Bagley, *Subprime Safeguards We Needed*, WASH. POST, Jan. 25, 2008.

[21] Rachel Barkow, Testimony Before the House Subcommittee on Commerce, Trade, and Consumer Protection, July 8, 2009 (available at energycommerce.house.gov/Press_111/20090708/testimony_barkow.pdf).



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other; or else he will hold to the one, and despise the other."[22] Because the agency must prioritize one task at the expense of the other, industry group pressure can easily cement an agency's preference for the task that favors industry. (This is generally not a concern for agencies with multiple but complementary mandates and authority over broad segments of the economy. EPA has many different responsibilities, but those responsibilities do not generally conflict with each other and in any event the agency would be exceedingly difficult for a single industry group to capture.[23]) MMS, for example, had three different jobs: it promoted the development of offshore oil drilling, it collected revenue from the leases oil companies secured on public lands, and it oversaw the safety of drilling operations. Against this conflict-ridden backdrop, it is unsurprising that the agency gave short shrift to its safety mission. The administration's decision to split MMS into three separate agencies, each with a single, clearly-defined mission, was thus a salutary effort to address capture at MMS.[24]

Third, officials who think of themselves as trusted professionals rather than just employees are much more likely to appreciate the significance of their roles and the importance of their jobs. They are consequently much less likely to place the interests of a regulated industry ahead of the public interest. Enhancing the prestige of agency employment—whether by paying government employees more competitive salaries, engaging in aggressive recruitment efforts, or instilling in officials a sense of their sometimes-profound responsibilities—may thus be the most effective long-term way to address the risk of capture. By increasing the relative desirability of government employment, such an approach could also make it less likely that competent and experienced officials would leave government service through the revolving door to private practice. Tightening restrictions on post-government employment would also go some distance to closing the revolving door.

In the final estimation, however, addressing agency capture will require political vigilance. Far too often, an agency's catastrophic failure or a scathing report from an Inspector General will produce loud calls for the reform, but the Executive Branch and Congress end up papering over the problems once the furor dies down. It has been evident for years, for example, that MMS was too close to the oil industry that it ostensibly regulated and that its multiple, conflicting missions were a serious problem. It nonetheless took the Deepwater Horizon spill to provoke meaningful reform. Because the interest groups that capture agencies are also quite capable of influencing politicians, it will take more than a modicum of political courage to press for lasting change at some of our most beleaguered agencies. I hope that this hearing reflects a renewed commitment to that task.

Thank you again for inviting me to testify today. I would be happy to answer any questions that you might have.

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[22] Matthew 6:24 (King James ed.).

[23] *See* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PENN. L. REV. 1111 (1990) (explaining why large, generalist agencies are less vulnerable to capture than single-industry agencies).

[24] Order of the Secretary of the Interior No. 3299, May 19, 2010.



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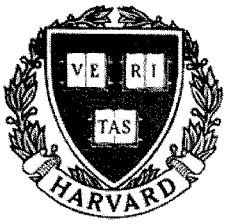


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*DIRECTOR, CENTER FOR AMERICAN POLITICAL STUDIES*
*HARVARD UNIVERSITY*
*CAMBRIDGE, MASSACHUSETTS 02138*

August 2, 2010

Senator Sheldon Whitehouse (Rhode Island)
United States Senate
Washington, D.C.

Dear Senator Whitehouse:

In write in advance of your Senate committee hearing this week on the issue of regulatory capture. Let me say that I believe this issue to be one of the most vital policy issues of our times, perhaps the single most salient regulatory issue facing our nation for the next 10 to 20 years. Democrats and Republicans alike spend a considerable amount of time debating – between the parties and within the parties – whether to imprint a certain policy into federal statute. Yet little congressional attention in recent years (and little scholarly attention, if I may indict my own fellow academics) has been given to the operation of regulatory institutions and their possible influences. This is especially true with recent laws and policies enacted by the U.S. Congress and signed by the President.

If you proceed with vigor and curiosity, you and your colleagues will do the nation an important service by placing this issue more centrally on our national agenda. Recent writers – ranging from James Surowiecki's "The Regulation Crisis" to Ezra Klein's "The hard work falls to the regulators" – have drawn attention to the limited capacities and independence of particular regulatory agencies in American government. From the financial crisis of 2007 and 2008 to the recent West Virginia mine collapse to the Deepwater Horizon explosion and Gulf oil spill, agencies with compromised independence have failed in ways that plausibly harmed tens of millions of American citizens.

Recent congressional activity makes robust regulation – regulation that is guided above all by the rule of law – the most important public policy issue of the next generation. The array of recent policy enactments that will depend for their success or failure upon the abilities of our government is both



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broad and daunting. Whether under Democratic or Republican leadership, recent decades have witnessed significant policy changes – from the Medicare legislation and the Sarbanes-Oxley Act in 2002 to the Food and Drug Administration Amendments of 2007. In the past few years the Obama Administration and the 111th Congress have added significant regulatory responsibilities to the federal government. These include the Credit Card Reform Act of 2009, the Family Smoking Prevention and Tobacco Control Act of 2009, the Patient Protection and Affordable Care Act of 2010, and the recently signed Wall Street Reform and Consumer Protection Act of 2010. All of these laws, whether signed by Democratic or Republican presidents, vest significant authority in our government agencies, as our constitutional republic allows and even encourages (U.S. Constitution, Article II, Section 2; *Federalist* #72).

Yet if our regulatory agencies are led astray from the public interest and the common good of the American people, none of the aims of these laws will be met, and the American people will sour further on the capacity of the government to respond to their needs and protect them. If they sour on our government and our regulated markets they will also sour on the fabric of our society, with damaging consequences for all.

Robust regulation of the American economy is as old as our Republic. Our nation's Founders and early Americans understood that marketplaces, like street corners, need competent and knowledgeable cops. And our Founders and early Americans understood that legislative statutes do not alone enact policy – discretionary rulemaking and enforcement authority was vested in the Post Office and Treasury Departments and later in the Agriculture, Interior, Commerce Departments, among others.

Our experience in American governance has shown us that capture is possible but not inevitable, and that certain forms of political and economic influence over regulation can co-exist with still functioning and robust regulatory regimes.

I encourage you to examine this issue and stick with it. To our collective peril, we have neglected the health of our regulatory institutions in America, and the Senate can, with this hearing and consistent vigilance, begin to correct that national failure. Please do let me know if I can, in any way, be of assistance to you and your committee in these efforts, and I wish you Godspeed.

Sincerely,

Daniel Carpenter



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**Consumers Union**
Nonprofit Publisher of Consumer Reports

August 2, 2010

Senator Sheldon Whitehouse, Chairman
Senate Judiciary Subcommittee on Administrative Oversight and the Courts
502 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Whitehouse:

Consumers Union (CU) writes in strong support of your efforts to prevent regulatory capture. CU has long worked to ensure that federal agencies have the resources and authorities they need to protect consumers from unsafe products, food, and autos, unscrupulous financial and telecommunications practices, and for a fair and safe marketplace. Preventing "capture" of federal agencies by the industries they are charged with regulating is critical to ensuring that these agencies are able to protect the public interest.

One recent example concerning a federal agency's independence from those it is charged with regulating involved the National Highway Traffic Safety Administration (NHTSA). The agency was in the news this year as part of the media's coverage of sudden unintended acceleration in Toyotas. Congressional hearings and media investigations into high speed crashes and deaths caused by unintended acceleration, the premature closure of agency defect investigations and the subsequent recall of millions of vehicles by Toyota Motor Corporation exposed an agency with a revolving door of regulators who left the agency to work for Toyota in safety matters before the agency.

Two bills were introduced recently to address this revolving door at NHTSA. The Motor Vehicle Safety Integrity Employment Act (S. 3268) and the Motor Vehicle Safety Act (S. 3302) would both close a legal loophole by delaying post-government employment in the auto industry by former NHTSA personnel. CU supports both bills.

We applaud your efforts to broadly address the problem of the revolving door and regulatory capture. Activities by former federal agency employees who are subsequently hired by the industries they once regulated have the potential to jeopardize the impartiality of an agency's investigations, rulemakings, and oversight functions. It is essential and expected that all federal agencies conduct independent analyses of all federal policy issues. It is critical to protect the integrity of an agency's investigatory and enforcement role, especially when public safety matters are involved.

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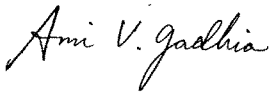
Addressing regulatory capture will prevent undue industry influence in federal agencies' enforcement and regulatory decision-making. Thank you for your leadership on this issue.

Sincerely,



Ellen Bloom
Director, Federal Policy and Washington Office

Ami V. Gadhia
Policy Counsel

**Consumers Union**

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**Senate Judiciary Subcommittee on Administrative Oversight and the Courts**
**Hearing on "Protecting the Public Interest:**
**Understanding the Threat of Agency Capture"**
**Tuesday, August 3, 2010**

**Statement of U.S. Senator Russell D. Feingold**

Mr. Chairman, thank you for holding this important hearing. Since the rise of the regulatory state in the mid 1960s, there has been a well-placed fear that government regulators have far too cozy a relationship with the corporations they regulate. A recent report by the Inspector General of the Department of the Interior exposed widespread corruption at the former Minerals Management Service. Federal regulators responsible for protecting the waters of the Gulf of Mexico allowed industry officials to fill out their own inspection reports, and they accepted lavish meals, tickets to sporting events, and other inappropriate gifts from the oil companies they were responsible for overseeing. We may never know whether these ethical lapses played a role in the events leading up to the Deepwater Horizon oil spill, but these events demonstrate that we need to be doing a better job to ensure that there are no significant conflicts of interest or other inappropriate ties between regulators and the corporations they purport to regulate.

I want to raise a concern that a new, more subtle type of agency capture is beginning to emerge as a result of our increasing reliance on government contractors. The Council of the Inspectors General on Integrity and Efficiency recently reported that the total number of suspensions and debarments in FY 2008 was half the total from five years ago, and that suspensions and debarments had been steadily decreasing over the last five years. This is a disturbing statistic, especially when you consider that the number of contract fraud, Foreign Corrupt Practices Act, and other corruption investigations involving contractors is on the rise. The Interagency Suspension and Debarment Committee (ISDC) is required to submit to Congress an annual report of the progress in the suspension and debarment system, and it has not yet issued its FY2009 report, so it is difficult to know whether this trend has continued under the Obama administration. I look forward to receiving ISDC's report, but I am concerned about this trend, even as incidents of contractor misconduct and overall government reliance on contractors are increasing.

The Project on Government Oversight (POGO) tracks contractor misconduct by the government's current top 100 contractors, which received 55% of all U.S. contracts in 2009. These contracts were valued at a total of $296 billion. According to POGO's records, over the last fifteen years, there have been only four suspension actions and zero debarment actions of these 100 contractors. This is alarming, especially when you consider that there have been a total of 686 incidents of contractor-related misconduct



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that resulted in almost $19 billion in total fees, restitution, and other criminal and civil penalties paid by these contractors.

Large corporations are often better able to identify, isolate, and correct misconduct when it occurs, and that may be part of the reason we have such a low rate of suspensions and debarments of our largest contractors. But I don't think that is the entire story. An agency should never be in a position where it is so dependent on a contractor to perform certain functions that it cannot take appropriate actions to suspend or debar that contractor. Several federal agencies have recently awarded new contracts to companies that are the subject of multiple criminal indictments or have pled guilty to serious criminal charges. This raises serious questions about agency independence and capacity.

I do not believe we should let corporations become "too big to fail," and I think the same should be true for our contractors. If they can't be trusted to run their businesses with integrity and to use U.S. taxpayer dollars honestly, then they should not be eligible to receive new contracts. We need to hold government contractors to a high standard, and I do not think that large corporations should be given a free pass for behavior that would typically result in the debarment of a smaller corporation.

Agencies should conduct evaluations of our contractors to determine if there are any areas where we are dependent on companies with poor track records, and if so, they should immediately work to develop internal capacity to perform these functions. I understand that the Office of Federal Procurement Policy is conducting a similar review and is considering when we may need to in-source certain security and intelligence functions. I hope all agencies will conduct a similar internal review.

The Government Accountability Office has also documented numerous instances of suspended and debarred companies continuing to receive federal contracts. In one case, a company that had been debarred for attempting to ship nuclear bomb parts to North Korea continued to receive millions of dollars from an Army contract. In another case, a contractor that had been suspended after one of its employees was found to have sabotaged repairs on an aircraft carrier was awarded three new contracts a month after the incident. This is unacceptable. It demonstrates that we need to be doing more to keep tabs on the companies that receive federal contracts, which is why I introduced the Federal Contracting Oversight and Reform Act of 2010, S. 3323, with Senator Coburn earlier this year. This bill will help ensure that private companies that we have determined are ineligible to receive government contractors do not receive contracts.

Mr. Chairman, thank you again for holding this important hearing. I look forward to working with you in the coming year to improve agency accountability and transparency.



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ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

August 10, 2010

The Honorable Sheldon Whitehouse
United States Senate
502 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Whitehouse:

On behalf of Earthjustice, I write to thank you for the recent U.S. Senate Judiciary Subcommittee on Administrative Oversight and the Courts hearing entitled "Protecting the Public Interest: Understanding the Threat of Agency Capture" Tuesday, August 3, 2010, and to submit the following comment for the record.

Earthjustice is a non-profit public interest law firm dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment. We work primarily through the courts on behalf of citizen groups, scientists, and other parties to ensure government agencies and private interests follow the law. We also advocate for protecting and strengthening federal environmental laws before Congress and the administration.

Agency capture, commonly understood to occur when the interests of the regulated entity divert or otherwise delay an agency from its duty to protect the public and/or enforce the law, has had untold impacts on the environment. Perhaps the most notorious example of agency capture, involving Department of Interior's Minerals Management Service (MMS), began making headlines during the Bush administration with reports of MMS officials' unethical contact with representatives from the oil and gas industry. The failure or inability to cut the ties between the agency and the regulated industry has been cited as a contributing factor in a continuing lack of industry oversight. Many are asserting lack of regulatory oversight led to the Deepwater Horizon explosion in the Gulf of Mexico, the worst environmental disaster in U.S. history.

While a cozy relationship between the regulator and the regulated entity may offer a juicier headline, an agency that actively shuts out the public is also exhibiting capture. Such activity has gone unchecked at the Department of Interior's Office of Surface Mining (OSM), the agency that is tasked with implementing and enforcing the 1977 Surface Mining Control and Reclamation Act. This law passed as a result of decades of concerns about the environmental effects of strip mining and it was clearly intended to, "protect society and the environment from the adverse effects of surface coal mining operations." However, in the three decades since the law was enacted, strip mining – including a highly devastating practice called mountaintop removal – has actually gotten worse, in large part due to a refusal to enforce the Act as well as hostility toward the public.

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According to one expert, a former attorney in the Interior Solicitor's office:

> Even as citizens used the Surface Mining Act's public participation provisions to achieve numerous successes, obstacles to effective public participation began to appear. Rather than valuing the help citizens provide, OSM became hostile to public prodding and has remained so – even to the point of stonewalling or unreasonably delaying response to the public's requests for basic information in instances where OSM is the regulatory authority. Inspection and enforcement requests on both the state and federal level are turned aside for entirely unjustified reasons or ignored altogether.[1]

This is especially noteworthy because the House Committee's report on the bill that became the Surface Mining Act concluded that:

> The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State or Department of Interior can employ only so may inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing. . . . Thus in imposing several provisions which contemplate active citizen involvement, the committee is carrying out its conviction that the participation of private citizens is a vital actor in the regulatory program as established by the act.

In this case, a vital element of the law – that citizens have a role in the regulatory process – has been thwarted. Congress explicitly recognized the role of the public in the agency's proceedings, yet the agency has shut the public out. This is a telltale sign of agency capture.

Though Congress has and must continue to recognize the important role that the public plays in agency decision-making when crafting legislation, it takes active oversight by the public and Congress alike to ensure that the regulatory agency is not diverted from the task it has been assigned.

We thank you, again, for the opportunity to highlight this case study of agency capture at OSM. We look forward to working with you and the subcommittee to continue to shine a light on agencies that put the interests of those they are charged with regulating above the law, which is likely the best first step toward agency recovery.

Sincerely,

Joan Mulhern
Senior Legislative Counsel
Earthjustice

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[1] See testimony of Walton Morris before the House Committee on Natural Resources, July 25, 2007, available at http://resourcescommittee.house.gov/images/Documents/20070725/testimony_morris.pdf



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Office of the Dean

August 2, 2010

The Honorable Sheldon Whitehouse
United States Senate
502 Hart Senate Office Bldg
Washington, DC 20510-3903

Dear Senator Whitehouse:

I write to support Congress taking a close look at the pervasive problem of "regulatory capture," and in conjunction with the upcoming hearing of the Subcommittee on Administrative Oversight and the Courts, on the important topic of "Protecting the Public Interest: Understanding the Threat of Agency Capture."

By way of background, I have been in legal education since I joined the faculty at Wake Forest University School of Law in 1981 and, since 2003, I have served as Dean and Professor of Law at Roger Williams University School of Law, Rhode Island's only law school. Over those years I have taught Torts to thousands of law students, and one of the themes I explore every year is institutional competence, that is, what is the best locus for decision-making regarding safety.

Of course, there are some who believe self-regulation by business (that is, little or no role for the government beyond the sanctions of criminal law to curb the pressures to sacrifice safety for profits), is consistent with our market-based economy. However, at least since the passage of the Food Drug and Cosmetic Act, in 1938, the consensus has been that market forces are insufficiently reliable by themselves to protect the public interest—a refusal to let the foxes guard the henhouse.

Assuming that we are unwilling to allow businesses to self-regulate, the remaining question is which arm of the government should be the primary focus of regulation of health and safety. For almost a century the answer has been a blend of judicial oversight (via the civil justice system—judges and juries litigating claims filed by injured people) and executive oversight (Congress delegates regulatory power to administrative agencies that have expertise in specialized areas, like auto and airline safety).

The latter approach is founded upon two key concepts. First, we assume that the government regulators will be expert in a particular field (like drug safety) in a way that the legislative and judicial branches can rarely be. Second, we assume that the regulators will consider their jobs a sacred public trust and not a way-station to a higher paying job in the very industry being regulated. Alas, this second assumption often turns out to be mistaken.

Legal scholars, like Professor Sidney Shapiro from Wake Forest and Cass Sunnstein from Harvard (now serving in the Obama administration), have for several decades identified the phenomenon of "regulatory capture," the process by which regulators tilt in favor of the interests of the businesses that

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they regulate. At the macro level, the theory posits that private industry often has greater expertise, focus, and resources than the citizenry, and even has similar advantages vis-à-vis the government (especially state and local governments). These advantages, unsurprisingly, result in insufficient enforcement of the law.

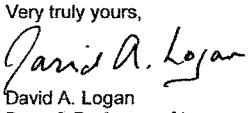
Regulatory capture is a problem at the micro level, as well. A strong version of this critique posits that regulatory oversight is harmed by the "revolving door" between government and industry, a result of individual avarice. But there are more modest versions, as well: under enforcement can be the by-product of a perfectly understandable desire for professional advancement. Because of their expertise, government employees may be able to find employment opportunities in a corporation or lobbying firm that are more interesting and better-paying. (This is because moving from the government to the private sector can more than double a salary.) From the point of view of the business being regulated, such an arrangement is a sound investment because a government employee brings to the table a combination of technical knowledge and personal relationships (and thus access–what used to be called their rolodex). Finally, even absent job-switching, agency capture can be the result of (largely benign) professional overlap, as experts in a given field necessarily share common information and interact at professional conferences and industry-specific gatherings.

The regulatory capture described above is not just the musing of out-of-touch academics. Here is a sample of recent stories that spotlight cozy relationships between the regulated and the regulator, and that can erode the public interest:

- "Ex-regulators Set to Lobby on New Financial Rules," New York Times, July 28, 2010 (reporting that hundreds of former government employees specializing in business regulation will be lobbying their former employers to gain favorable treatment under the recently-passed financial reform legislation).
- "Minerals Management Service: Drilling Overseer Dysfunctional from the Start," Denver Post, June 6, 2010 (reporting that employees at agency responsible for regulating offshore oil exploration accepted gifts, including sex and drugs, from the oil companies they regulated).
- "Act 1 for Toyota," National Law Journal, May 3, 2010 (reporting that a former official at the National Highway Safety Administration was now working for Toyota's "regulatory affairs department").

It is my hope that the Subcommittee on Administrative Oversight and the Courts will identify the phenomenon of agency capture and develop legislation to constrain this serious corrosion of the regulatory system.

Very truly yours,



David A. Logan
Dean & Professor of Law



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**TESTIMONY OF SIDNEY A. SHAPIRO**

**UNIVERSITY DISTINGUISHED CHAIR IN LAW,**
**ASSOCIATE DEAN FOR RESEARCH AND DEVELOPMENT,**
**WAKE FOREST SCHOOL OF LAW**
**AND**
**MEMBER SCHOLAR, VICE-PRESIDENT**
**CENTER FOR PROGRESSIVE REFORM**

**BEFORE THE**
**SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS**
**OF THE**
**SENATE COMMITTEE ON THE JUDICIARY**

**HEARING ON**
**PROTECTING THE PUBLIC INTEREST: UNDERSTANDING THE THREAT OF AGENCY CAPUTRE**

**AUGUST 3, 2010**

Mr. Chairman and Members of the Committee, thank you for inviting me here today to share with you my views on understanding the threat of agency capture and its relationship to protecting the public interest.

I am the University Distinguished Professor of Law and an Associate Dean at the Wake Forest School of Law. I am also a Member Scholar and Vice-President of the Center for Progressive Reform (CPR) (http://www.progressivereform.org/). Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of sixty scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary.

My work on regulation and administrative law includes six books, seven book chapters, and over fifty articles (as author or coauthor). I just finished a book on administrative accountability published by the University of Chicago Press, coauthored with Professor Rena Steinzor: *The People's Agents and the Battle to*



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*Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment.*[1] I have served as consultant to government agencies and have testified before Congress previously on regulatory subjects.

The performance of government agencies is crucial for two reasons. Agencies not only have important roles to play in protecting the health and safety of the public and the integrity of the environment, their performance is an important aspect of democratic accountability. When Congress passes and the president signs legislation, the failure to achieve these commitments devalues the democratic processes that produced the legislation and the commitments made in those laws. As Senator Whitehouse has pointed out, the Minerals Mining Services, which utterly failed to carry out Congress' intentions to regulate off-shore drilling, is a glaring example of how the public interest can be damaged by a captured agency.[2]

Agencies fall short of achieving their statutory missions for a variety of reasons, but "agency capture" is one the most significant causes. The classic definition of agency capture (or regulatory capture) is that the industry being regulated is able to gain control over the regulatory process, diverting it from protecting the public.[3] The academic literature reveals that industries are captured an agency through three processes:

- Political capture: Agencies become captured when the President appoints administrators who spend their time in office as an opportunity to stymie the efforts of the career staff to adopt new regulations and enforce the ones already on the books.

- Representational Capture: Agencies become captured when they hear only from the industries being regulated because the public lacks representation before the agency.

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[1] RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT (2010).

[2] *Senator Whitehouse Slams Corporate Influence at Minerals Management Service, Proposes Legislation to Defend Integrity of Government*, U.S. FED. NEWS, June 18, 2010.

[3] See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 3 (2nd ed. 1971) (providing the classic definition of agency capture).

- Sabotage Capture: Agencies become captured when the opponents of regulation, through legislation and executive orders, create roadblocks that slow or prevent regulation even in administrations that seek to protect the public and the environment.

My testimony will explain these sources capture and offer some recommendations concerning how Congress might strengthen the administrative system to resist them.

POLITICAL CAPTURE

The type of capture that receives the most attention is when an agency fails to protect the public and the environment apparently because regulators friendly to industry, appointed by presidents who are hostile to regulation, block regulatory efforts or do not enforce the laws and regulations then in effect. The situation at MMS, noted earlier, is a good example.

The concept of capture is a term from political science, and as such, expresses the idea that a business friendly administration is in power, and it rewards its supporters by adopting regulatory positions they favor. In other words, it is a description of what has happened. As a normative matter, regulatory critics, dispute that this form of capture is necessary a bad thing. Having won an election, they contend that a president who is skeptical of regulation is entitled to appoint administrators who likewise are skeptical of regulation.

The situation is different, however, when capture involves the failure to administer and enforce the laws on the books. Instead of going to Congress to seek appropriate amendments of the law, business-friendly presidents have pursued a strategy that in effect repeals it without changing the law. It is one thing to promulgate a regulation that may be somewhat weaker than consumers or environmentalists might prefer, but which is still legally permissible, it is entirely another matter to stymie the development of needed regulation or to weaken the enforcement of rules that are already on the books.

REPRESENTATIONAL CAPTURE

The second form of capture occurs when there is an imbalance in representation. Am agency is like to adopt an industry-friendly point of view if the only people that it hears from, or primarily hears from, are members of the industry itself. As Professor Howard Latin has explained:

> Industry representatives appear regularly in agency proceedings and can usually afford to offer detailed comments and criticisms on possible agency decisions, while environmental groups intervene on an intermittent basis and the unorganized public seldom participates at all. This routine asymmetry will increase agency responsiveness to industry criticism. No matter how sincere and public spirited officials are when appointed, a process of negative feedbacks will produce shifts toward the positions espoused by regulated parties.[4]

In the 1960s and 1970s, the courts and Congress sought to redress this imbalance by making it easier for public interest groups to participate in the rulemaking process[5] and by making government decision-making more transparent.[6] Despite these developments, representational capture remains a problem because corporations and their trade associations have a substantial resource advantage which permits them to dominate the rulemaking process most of the time at most agencies.

A 1977 Senate committee report found that large regulated parties had a significantly greater presence in agency decision-making processes than did public

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[4] Howard Latin, *Regulatory Failure, Administrative Incentives and the New Clean Air Act*, 21 ENVT'L. L. 1647, 1673 (1991).

[5] The courts expanded rulemaking notice requirements, established a strong presumption that agency action and inaction were subject to judicial review, liberalized standing requirements for citizens' groups that sought judicial review, empowered public interest groups to represent statutory beneficiaries in federal court, and required agencies to have "adequate" explanations for their actions. Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1746 (2008).

[6] Congress passed the Freedom of Information Act 26 (FOIA), the Federal Advisory Committee Act27 (FACA), and the National Environmental Policy Act of 196928 (NEPA), which were intended to make it difficult for agencies to adopt industry-friendly policies behind closed doors. *Id.*

interest groups and outside parties.[7] More recent evidence suggests that the situation has not changed.

Scott Furlong's study of registrations required by the Lobbying Disclosure Act indicates that business lobbyists who lobby the Executive Branch outnumber public interest by more than 10 to 1.[8] This dominance translates into higher rates of participation in rulemakings. A survey of Washington-based interest groups by Furlong and Neal Kerwin found that individual businesses participated in over twice the number of rulemakings as other types of organizations.[9] An earlier survey by Furlong found that business interests submitted many more comments on proposed regulations than other interests did.[10]

This dominance also translates into higher rates of comments in rulemakings. Jason Webb Yackee and Susan Webb Yackee, who studied forty rules promulgated by four agencies from 1994 to 2001, found business interests filed 57% of the comments; governmental interests filed 19% of the comments; and nonbusiness, nongovernmental interests submitted 22% of the comments. Public-interest-group comments constituted only 6% of the total of comments submitted by nonbusiness, nongovernmental interests.[11]

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[7] STAFF OF S. COMM. ON GOVERNMENT AFFAIRS, 96TH CONG., PRINCIPLE RECOMMENDATIONS AND FINDINGS OF THE STUDY ON FEDERAL REGULATION 25 (Comm. Print 1979).

[8] Scott R. Furlong, *Exploring Interest Group Participation in Executive Branch Policymaking, in* THE INTEREST GROUP CONNECTION 282, 290-91 (Paul S. Herrnson et al. eds., 2d ed. 2005).

[9] Examining lobbying reports for 1996, Furlong identified registrants who indicated that they sought to influence environmental and natural-resource issues and that they lobbied both Congress and the Executive Branch. Over 94% of these registrants were business or trade associations, while only about 3% of the registrants were public interest groups. Furlong found a similar situation when he looked at the clients of lobbying firms. Over 73% of the clients listed were business interests as compared to about 6% who were public interest groups. Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rulemaking: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 361 (2005).

[10] Furlong, *supra* n. 8.

[11] Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006). The four agencies were OSHA, the Employment Standards Administration (ESA), the Federal Railroad Administration (FRA), and the Federal Highway Administration (FHA). The study selected all rules receiving fewer than two hundred comments but more than one comment.

Melissa Golden, who examined comments filed on eleven proposed regulations at three agencies, found the same business dominance.[12] The dominance was greatest for the eight rules proposed by EPA and NHTSA. Corporations, public utilities, and trade associations filed between 66.7% and 100% of the comments concerning these rules, and neither EPA nor NHTSA received any comments from public interest groups concerning five of the eight rules. 73

Cary Coglianese, who studied twenty-five significant EPA rules promulgated under the Resource Conservation and Recovery Act (RCRA) between 1989 and 1991, found that business interests participated 95% of the time, national trade associations participated 80% of the time, and citizen groups participated 12% of the time. Groups representing regulated industries constituted 59% of all participants, and groups representing environmental and citizen groups constituted 4%.[13]

Finally, Professors Wendy Wagner, Katherine Barnes and Lisa Peters While, who studied 39 controversial and technically complex hazardous air pollutant rules, found that industry averaged 77.5 percent of the total comments while public interest groups averaged only 5 percent of those comments. In fact, public interest groups filed comments for only 46 percent of the rulemakings. Prior to the start of a rulemaking, industry accounted for an average of 83.6 of the informal communications, while public interest groups averaged 0.65 percent of those communications.[14]

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[12] Marissa Martino Golden, *Interest Groups in the Rulemaking Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 250, 252 (1998). The three agencies were EPA, NHTSA, and the Department of Housing and Urban Development (HUD)..

[13] Steven P. Croley, *Theories of Regulation. Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 129 (1998), *citing* Cary Coglianese, Challenging the Rules: Litigation and Bargaining in the Administrative Process 46-47 tbl.2-x (1994) (unpublished Ph.D. dissertation, University of Michigan).

[14] Wendy E. Wagner, Katherine Barnes, & Lisa Peters, *Air Toxics in the Board Room: An Empirical Study of EPA's Hazardous Air Pollutant Rules* (Nov. 13, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531243.

Evidence that the business community has more lobbyists and participates more frequently in filing rulemaking comments does not establish that business interests always prevail in the administrative process. Nevertheless, the superior funding of the business community is a significant source of representational capture.

SABOTAGE CAPTURE

The final form of capture receives less attention, but it is no less effective in preventing reasonable regulation than the other forms of capture. Agencies become captured when the opponents of regulation, through legislation or executive orders, create roadblocks that slow or prevent regulation even in administrations that seek to protect the public and the environment.

Because this form of capture is subtle and difficult for the public to perceive, it constitutes "sophisticated sabotage" of the regulatory process. Sophisticated sabotage involves policies and reforms that appear to be reasonable, but their impact is to "monkey-wrench" the regulatory process.[15] This form of capture has created systematic regulatory failures across the government, as evidenced by:

- Late, slow, and even nonexistent efforts to tackle the most obvious and pressing threats to public health, worker safety and the environment;
- Failure of the most rudimentary implementation efforts – absence of routine inspections of manufacturing facilities, delays in writing or renewing permits that control industrial activities, fatal mistakes in the approval of new drugs and the monitoring of drugs already on the market, and abdication of responsibility for the safety of the growing number of imported foods and consumer products; and,
- The collapse of enforcement of regulatory requirements against consistent violators and scofflaws.[16]

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[15] *See* THOMAS O. MCGARITY, SIDNEY SHAPIRO & DAVID BOLLIER, SOPHISTICATED SABOTAGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION (2004).

[16] Sidney Shapiro, Rena Steinzor, & Matthew Shudtz, *Regulatory Dysfunction: How Insufficient Resources, Outdated Laws, and Political Interference Cripple the "Protector Agencies,"* August, 2009, at 3 (CPR White Paper), available at http://www.progressivereform.org/articles/RegDysfunction_906.pdf.

Funding

The inability of regulatory agencies to act swiftly and decisively in the last several decades is attributable in no small part of severe shortfalls in funding. As deficits grow, and economic anxiety deepens, the President and Congress return again and again to cuts in the discretionary portion of the budget. This has opened the door for regulatory opponents to defund the agencies based on the apparently reasonable proposition that we cannot afford better regulatory protections.

As a result, four important regulatory agencies (CPSC, EPA, OSHA, NHTSA) have not received significant increases in their budgets since roughly 1980, approximately a decade after they were created, once inflation is taken into account.[17] A fifth agency (FDA) has escaped this fate only because the pharmaceutical industry pay fees to support the new drug approval process.

OSHA's difficulty in promulgating a new regulatory standard for cranes and derricks illustrates the impact of budget cuts. In 1971, it issued regulations for the use and operation of cranes, derricks, and other heavy machinery at construction sites. As of August, 2009, OSHA had not updated this rule despite vast changes in technology and work processes. Beginning in the mid-1990s, industry itself began petitioning OSHA for stronger and more comprehensive regulations and in 2004 a committee of industry, labor, and government representatives reached agreement on a draft proposed rule. But five years later, this rule was still trapped somewhere in OSHA, waiting to be issued. Meanwhile, by OSHA's own estimates, 89 crane-related deaths and 263 crane-related injuries occur each year, and the draft rule would reduce these numbers by 59 percent. Thus, for every year the rule sat on a desk, 53 people die and another 155 were injured unnecessarily.[18]

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[17] STEINZOR & SHAPIRO, *supra* n. 1, at 65.

[18] Catherine O'Neill, Amy Sinden, Rena Steinzor, James Goodwin, and Ling-Yee Huang, *The Hidden Human and Environmental Costs of Regulatory Delay*, October, 2009, at 13 (CPR Whitepaper), available at http://www.progressivereform.org/articles/CostofDelay_907.pdf.

Throughout the delay period, industry representatives, members of the rulemaking committee, OSHA representatives, and Members of Congress all expressed overwhelming support for the draft rule and urged final approval. When OSHA first publicly acknowledged the need to update the rule in 1999, it was in response to repeated requests by industry representatives. In July 2008, a group of senators wrote an open letter to Secretary Chao, calling the regulatory delay—both the failure to update the rule since 1971 and the four-year delay in submitting the draft rule to the OMB—"unfathomable."[19]

But the delay is fathomable. OSHA lacks the resources to complete it in a timely manner, as an OSHA spokesman explained:

> You know, the timelines, it's very difficult to predict these dates. You know, we don't work independently. We work with a number of different agencies within OSHA. Those different parts of OSHA have projects other than our project and so inevitably there is some competition of resources and, you know, the agency as a whole has been working on many, many projects concurrently.[20]

While the White House and members of Congress contend that the country cannot afford to do better, the budgets of the five agencies mentioned earlier are irrelevant to the federal budget and the deficit. The total amount spent in 2008 operating these five agencies was 0.29 percent of the total budget that Congress approved on April 2, 2009, and 0.89 percent of the $1.2 trillion deficit projected for FY 2010.[21]

While the argument that is necessary to reduce spending on regulatory agencies might appear reasonable on its face, it is foolhardy. While no reliable estimates have ever been prepared of the costs of regulatory failure and delay, one only has to look at a regulatory failure to see why the budget cuts are penny wise and pound foolish.

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[19] *Id.* at 15.
[20] *Id.* at 14-15 (quoting Noah Connell, the director of OSHA's Office of Construction Standards and Guidance).
[21] STEINZOR & SHAPIRO, *supra* n. 1, at 56.

Consider, for example, that the peanut industry alone suffered $1 billion in losses, nine people died, and 20,000 were sickened as a result of the salmonella outbreak at a Georgia peanut processing plant during the fall and winter of 2008–2009; the recall of 2,100 types of products containing the tainted nuts must have cost much more.[22] And, of course, from the perspectives of the families who lost loved ones, the loss was priceless. The plant was inspected and given a clean bill of health by an unqualified private-sector inspector paid by the peanut plant operator and hired under pressure from the plant owner's largest customers. The peanuts were shipped despite the owner's receipt of tests showing salmonella from an independent testing lab.

Multiply this single incident by countless episodes in the workplace, the pharmacy, the grocery store, and the playground on a code red air pollution day, and cumulative, quantifiable costs, not to mention non-quantifiable losses, are likely to dwarf the cost of making the regulatory system effective.

Political Interference

Over the last 30 years, the work that Congress delegated to agencies because of the specialized training and expertise of their staffs, has increasingly come under strict oversight and control by the White House. This effort has had two effects that constitute sabotage capture.

First, it slows the regulatory process. Today, agencies might have to go through more than 100 discrete analytical steps before they can adopt a regulation.[23] Peter Barton Hurt, a former FDA general counsel now in private practice, has noted the burden imposed on FDA:

> [I]n order to promulgate a regulation, the FDA must at a minimum include, in the preamble, not only full consideration of all substantive issues raised by

[22] STEINZOR & SHAPIRO, *supra* n. 1, at 71.
[23] Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*," 27 FLORIDA ST. L. REV. 533 (2000).

> the regulation itself, but also a cost-benefit and a cost-effectiveness analysis, an environmental impact discussion, a federalism evaluation, a small business impact statement, a determination whether there is an unfunded mandate impact on state or local governments, an analysis of paperwork obligations, and an assessment on the impact on family well-being. . . . However well-intentioned, these responsibilities place a major burden on the FDA and require that scientific resources be diverted from other areas in order to assure compliance.[24]

The most important regulatory impact requirement is Executive Order 12,866, which requires a cost-benefit analysis of the proposed rule, a requirement that many in Congress and the White House think is a reasonable requirement. After all, who could oppose studying the costs and benefits of a proposed rule? But, as extensive literature demonstrates, this effort is largely a waste of time, and thus another example of sophisticated sabotage.[25]

Second, White House oversight has lead to the undermining of Congress's goal of regulating health and safety based on expert analysis of the science and policy. This is illustrated by the evolution of EPA's Integrated Risk Information System (IRIS):

> In 1985, EPA staff determined that there was a need to develop a centralized database of all the various chemical risk assessments that were being developed around the agency's program and regional offices. These risk assessments were the cornerstones of regulatory decisions ranging from how to control toxins in the air and water, to how clean the soil would have to be at Superfund sites around the country. From 1985 until 2004, EPA scientists in the Office of Research and Development (ORD) coordinated the addition of new chemical assessments to the IRIS database. But in 2004, John Graham, Administrator of the Office of Information and Regulatory Affairs (OIRA) ... initiated a complete redesign of the IRIS assessment process that would eventually give OMB a powerful voice in every stage of the scientific assessment process. Congressional staff have uncovered evidence that individuals at OMB went so far as to make editorial comments on specific chemical profiles, "comments that would have changed the import and meaning of the scientific findings" made by EPA scientists.

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[24] Peter Barton Hutt, *The State of Science at the Food and Drug Administration*, 60 AD. L. REV. 432, 439-40 (2008) (footnotes omitted).

[25] See, e.g., Sidney A. Shapiro & Christopher Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENV. L. REV. 433 (2008); *see also*, FRANK ACKERMAN AND LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

> Since the White House became intimately involved in the IRIS assessment process, EPA staff have struggled to cope with the added political pressures. Only a few chemical profiles are added to the database each year, ultimately hampering EPA's ability to develop second generation air pollution regulations and cleanup standards for major Superfund sites ....[26]

The White House oversight of EPA's efforts to set a national ambient air quality standard (NAAQ) for ozone is another good illustration of how regulatory review leads to sophisticated sabotage.[27] As explained in my book:

> ... In 2003, the American Lung Association sued the EPA over the delay [in revising the ozone NAAQ], and the agency agreed to a court order stipulating that it would promulgate revised standards no later than March 12, 2008....
>
> The agency's revisions were based on an elaborate process that took several years and involved the preparation by staff scientists of lengthy documents that assessed and summarized the state of the relevant research. Those documents were then reviewed by the Clean Air Science Advisory Committee (CASAC), a panel of outside scientists established by the Clean Air Act. The CASAC ... recommended unanimously, in itself an unusual outcome, that the EPA revise both the primary and the secondary standards to even lower levels than those selected by Stephen Johnson, the EPA administrator. The proposed new standards were published for comments, the EPA staff reviewed all the comments, and a final notice was prepared. Johnson sent it over to the White House, expecting it to be approved in time for a press conference he had scheduled for March 12, 2008.
>
> On March 6, 2008, Susan Dudley, the director of the OMB's OIRA, wrote Johnson a memorandum explaining that she disagreed with the secondary NAAQS issued by the EPA and planned to appeal the issue to the president.... Dudley argued that the EPA should have considered economic values in setting the standard. Johnson's deputy administrator, Marcus Peacock, responded on behalf of the agency that cost was not a legally permissible criterion under the act.[28] President Bush ultimately sided with Dudley, and

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[26] *Regulatory Dysfunction, supra* n. 16, at 12-13.

[27] Ozone is formed when nitrogen oxides combine with volatile organic compounds in the presence of sunlight. Excessive amounts of ozone are quite harmful to people and animals, exacerbating respiratory diseases like asthma. Ozone pollution is also harmful to crops, forests, and other vegetation, which can die or have their growth severely stunted. Consequently, the act instructs the agency to set a "primary" standard to protect people and a "secondary" standard to protect natural resources. STEINZOR & SHAPIRO, *supra* n. 1, at 204.

[28] The statute requires that limits be set without regard to cost, at whatever level is sufficient to protect health and the environment with an "ample" margin of safety. The Supreme Court has

the secondary standard was revised to be the same as the primary standard. Administrator Johnson announced the decision, defending it as a loyal soldier representing his president. But Dr. Rogene Henderson, chair of the CASAC and a leading national expert on air pollution, subsequently told Congress that as a result of the OMB's interference, "Willful ignorance triumphed over sound science."[29]

## REDUCING CAPTURE

The multifaceted problem of capture is a serious threat to the viability of the safety, health, and environmental legislation that Congress has passed. If Congress can reduce capture, it is more likely that agencies can fulfill its intention to protect people and the environment. Congress can reduce capture by improved oversight, better coordination between authorization and appropriations committees, by employing positive metrics, and by considering "true-up" budgets.

### Improved Oversight

Congress cannot count on the administrative law system to ensure the accountability of the regulatory agencies. As noted, public interest groups lack the resources to match up with industry in terms of advocacy before agencies and the courts. As a result, many times they are not in a good position to address capture, whether it occurs because of political capture or information capture. Likewise, they are often not in a good position to call to Congress' attention to capture. It is therefore up to Congress to institute more systematic oversight to address these problems. Such oversight is possible even when a party is in the minority, as Representative Henry Waxman's efforts during the Bush Administration demonstrated.

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interpreted this language to mean that the EPA can only consider adverse effects and not the costs of reducing ozone, an outcome fiercely opposed by industry groups. *Id.* at 204.

[29] *Id.* at 204-205.

Linking Oversight and Appropriations

The defunding of the regulatory agencies has been justified by the necessity of reducing the budget deficit. The regulatory agencies, however, are such a small part of the discretionary budget that Congress could give them modest increases in funding without affecting the annual budget or deficit in any significant manner.

One reason Congress appears to have failed to consider this possibility is that there has been insufficient attention paid to the downside of the funding shortfalls. One way for Congress to have this conversation is for the authorization committees to study the impacts of the funding cuts on the agencies within their jurisdictions and to share this information with the appropriation committees.[30] This would put Congress in a better position to consider what funding tradeoffs are involved in refunding the regulatory agencies, and whether funding them is a higher priority than other items in the budget.

Positive Metrics

One reason the deterioration of regulatory government has gone relatively unnoticed is that Congress lacks a good means for measuring the performance of the regulatory agencies. Congress could address this gap by requiring the development of rigorous and concise "positive metrics" that would alert Congress and the public when health and safety agencies have run into trouble.[31]

This is not an entirely new idea. Some federal and regional agencies have experimented with "indicator" reports, which are generally focused on ambient conditions, or pollution levels, in various environmental media (air, water, or soil).[32] The most aggressive effort to exact accountability is the Government Performance

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[30] STEZINOR & SHAPIRO, *supra* n. 1, at 61-65.
[31] *Id.* at 173-91.
[32] See, e.g., U.S. EPA, Office of Research and Development and the Office of Environmental Information, *Draft Report on the Environment: Technical Document*, EPA 600-R-03-050 (Washington, DC: EPA, 2003), http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=30005E2Z.txt; U.S. EPA, *EPA's Report on the Environment*, EPA/600/R-07/045F (Washington, DC: EPA, 2008), http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1002S1J.txt.

and Results Act of 1993 (GPRA), passed in 1993.[33] The concept underlying the GPRA—holding agencies accountable by scrutinizing their actual performance—is unassailable. But, what is necessary is the measurement of performance on the basis of positive metrics that invite a diagnosis of the impediments that prevent agencies from achieving their statutory missions. Such metrics would attract public attention to agency successes and shortcomings, producing early warning signs that can motivate a search for potential solutions.

The concept of positive metrics differs from previous reporting requirements in another fundamental way. While the elaborate paperwork that these programs have generated is easy to recover from the internet, one has to be a knowledgeable stakeholder to get any satisfaction out of reading these arcane narratives. These documents represent the essence of "inside baseball," making them unintelligible to congressional staff and reporters, much less the general public. To be successful, positive metrics must be sufficiently concise and accessible that they could interest and inform regulatory outsiders.

It will be no easy task boiling down the existing morass of data about agency performance. Moreover, there is a crucial distinction between identifying regulatory gaps and actually addressing the causes of these problems. Nevertheless, Congress should consider the concept of positive metrics as a way of providing to it crucial information about agency performance. When the metrics indicate that agencies are significantly failing to make progress, then Congress is in a position to assess whether this is due to political, information, or sabotage capture, or some other cause, such as insufficient legal authority.

True-Up Estimates

The congressional dialogue over funding would be improved if agencies were required to make it clear how much money it would really take to implement their

[33] Public Law 103-62, U.S. Statutes at Large 107 (1993): 285, codified in scattered sections of U.S. Code titles 5 and 31.

regulatory mandates. Such "true-up estimates" should focus on the resources the government itself would need, calculated in constant dollars over a decade-long period, to do the work involved in enforcing or modifying existing rules and developing new ones.[34]

## CONCLUSION

The problem of capture is persistent, suggesting that it is not easily remedied. In the 1970s, the Senate undertook a major study on federal regulation.[35] A similar effort, focused on capture and including consideration of such new ideas as positive metrics and true-up budgets, may be in order. The newly reformed Administrative Conference of the United States (ACUS) could be tasked with this investigation.

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[34] STEINZOR & SHAPIRO, *supra* n. 1, at 69-70; 226-27
[35] See *supra* n. 7.

**STATEMENT OF PROFESSOR WILLIAM J. SNAPE, III**

**BEFORE THE U.S. SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, ON FEDERAL"AGENCY CAPTURE" BY INDUSTRIES, AUGUST 3rd, 2010**

Mr. Chairman, thank you for the opportunity to submit this brief testimony on your important hearing today. My name is Bill Snape, senior counsel with the Center for Biological Diversity and a practitioner-in-residence at American University's Washington College of Law. I have been doing environmental policy work and litigation for over twenty years, and have written extensively on natural resource conservation issues. My areas of expertise include climate change, energy, public lands, endangered species and pollution law at both the domestic and international levels.

While my most recent experience with agency capture involves the Department of the Interior's Minerals Management Service (MMS), now purportedly restructured by Interior Secretarial Order 3299 (May 19, 2010), the catastrophe caused by the BP/Interior oil disaster in the Gulf of Mexico is unfortunately indicative of a larger trend in reckless federal agency behavior. Other prominent examples of federal agencies failing the American people include the U.S. Housing and Urban Development Department (HUD) and Securities and Exchange Commission (SEC), both of which contributed mightily to the devastating housing bubble and financial speculation that caused the current economic downturn. The lesson in all these instances is we needed more regulation, not less.[1]

For purposes of today' hearing, I will focus predominantly on the Interior/MMS debacle but note there are three common denominators that characterize the broader agency capture phenomenon:

1) Large sums of money are usually at stake, and the agency's questionable decisions result in determinations as to who receives such monies and how much;
2) The powerful combination of agency and industry rhetoric results in a deceiving "mainstream" view that the agency behavior at issue is either desirable or inevitable until the bubble literally bursts (e.g., "we must increase oil drilling for national security," or "the market will self correct any artificial inflation of stock, bond or derivative price.");
3) Transparent and readily available information to the interested public is lacking. The remainder of my statement will delve into this "information factor" more extensively.[2]

Perhaps the most shocking aspect of the BP Gulf incident was how complicit the U.S. Department of the Interior's MMS was in its cause and chaotic aftermath. Despite the existence of the National Environmental Policy Act (NEPA), 42 U.S.C. Sections 4321 et seq., a procedural statute that is considered the grandparent of modern environmental statutes, Interior/MMS regularly blocked the public from

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[1] See Judge Richard Posner, A Failure of Capitalism (2009)(citing, inter alia, the reckless lowering of interest rates by Federal Reserve Board and regulation of the financial sector as prime causes of the "'08 Depression"). See also Eliot Spitzer, *Regulators and Risk-Takers: Didn't Big Pharma and the FDA Learn Anything from the Gulf oil spill or Wall Street Meltdown?*, Slate (July 14, 2010).

[2] Some identify the easy movement of individuals between for-profit corporations and federal agencies as a cause of agency capture, but I would argue this is more of an effect. Although our ethics rules could be strengthened, particularly with regard to conflicts of interest, agencies will always need experienced individuals to run them. It is the allure of cash and power that drives this professional movement, and better transparency can stem abuse.



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review of its offshore oil drilling operations in the Gulf of Mexico. It did this in several ways. First, during the five-year plan required by law, Interior/MMS would claim that it was too early to do comprehensive environmental analysis but would do so at the site-specific stage.[3] Second, at the site-specific stage, Interior/MMS would then issue categorical exclusions (CE) that were not published in the Federal Register, did not seek general public or scientific comment, and would completely ignore issues such as the probability of spills or enforceability of mitigation plans.[4] Third, under other conservation statutes such as the Clean Water Act, Endangered Species Act (ESA)[5], and Marine Mammal Protection Act, Interior/MMS would also cut corners. The theme here is very simple: Interior/MMS utterly failed to "look before they leaped" on increasingly dangerous drilling operations in the Gulf of Mexico.[6]

Another central element in excluding the public from seeing cozy agency/industry relationships is a narrowing interpretation of the Freedom of Information Act (FOIA). As you know, the FOIA is generally a beacon of open government, emulated by countries around the world, and embraced by so-called liberals and conservatives alike. The statute requires agency rules, opinions, orders, records and proceedings to be available to the public unless a specific exemption applies. "Disclosure, not secrecy, is the dominant objective of the Act." Department of the Air Force v. Rose, 425 U.S. 352 (1976). But over the past decade or two, the exemption covering "commercial or financial information obtained from a person" has grown. 5 U.S.C. Section 552 (b)(4). See also 552 (b)(9) (oil well data). Examples of items legitimately regarded as commercial or financial information include: business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition." Wash Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982). Yet, the Department of Justice has increasingly argued, with some success, that certain remuneration and scientific information is shielded from public view, even if such information goes directly toward agency behavior issues. See, e.g., Defenders of Wildlife v. Interior, 314 F.Supp.2d 1 (D.D.C. 2004)(oil and gas divestment agreements from private sector to Interior Deputy Secretary Steve Griles, who later went to jail on oil and gas corruption conviction, shielded by FOIA Exemption 4 despite prima facie evidence of conflict of interest).

The most obvious conclusion is that the FOIA exemptions should be re-examined when evidence of agency malfeasance is present. Further, all agency compliance documents should be posted on the web with sufficient and timely Federal Register notice. Sunshine is a powerful tonic against corruption.

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[3] See CBD v. Interior, 563 F.3d 466 (D.C. Cir. 2009), upholding the Secretary's reading of the Outer Continental Shelf Lands Act (OCSLA) in this respect.

[4] See Ian Urbina, *Despite Moratorium, Drilling Projects Move Ahead*, The New York Times (May 23, 2010) (noting that categorical exclusions were issued for oil project in the Gulf both before and after the BP blow out). This author's research indicates that MMS has granted well over 6,000 CEs for Gulf oil projects since 2000.

[5] The ESA Section 7 consultation process, which mandates that federal agencies such as MMS protect listed species such as whales, sea turtles and certain migratory birds in the Gulf, possesses the aberration of being generally closed. Unlike other important ESA events such as listing and recovery plans, consultations are not required to be published in the Federal Register meaning that industry representatives generally control the process. See, e.g., Oliver Houck, *The ESA and its Implementation by the U.S. Departments of Interior and Commerce*, 64 Univ. Colorado L.R. 277 (1993).

[6] However, it should be noted that the Gulf of Mexico has a sad and rich history of oil spills, both in deep water and shallow water. See, e.g., Steve Mufson, *Federal Records Show Steady Stream of Oil Spills since 1964*, The Washington Post (July 24, 2010).



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Written Testimony of the Hon. Tevi D. Troy, Ph.D.

Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
Hearing on
"Protecting the Public Interest: Understanding the Threat of Agency Capture"

Tuesday, August 3, 2010

Mr. Chairmen, Ranking Member, Members of the Committees, thank you for this opportunity to provide insight into the question of influence on the regulatory process. My name is Tevi Troy, and I am a Visiting Senior Fellow at the Hudson Institute, a Senior Fellow at the Potomac Institute, and a writer and consultant on health care and domestic policy. On August 3, 2007, I was unanimously confirmed by the U.S. Senate as the Deputy Secretary of the U.S. Department of Health and Human Services, where I served as the Regulatory Policy Officer for HHS, overseeing the development and approval of all HHS regulations and significant guidance. While I was at HHS, I was also privileged to join with Chairman Whitehouse at an event in Rhode Island promoting health information technology, and appreciate his dedication to the subject.

I have extensive White House experience, having served in multiple high-level positions over a five-year period, at the Domestic Policy Council, the Office of Cabinet Affairs, and back at the Domestic Policy Council, where I served as the Deputy Assistant and Acting Assistant to the President for Domestic Policy. In this capacity, I was the White House's lead adviser on health care, labor, education, transportation, immigration, crime, veterans' issues and welfare. Before coming to the White House, I was the Deputy Assistant Secretary for Policy at the Department of Labor, where I was responsible for the Department's regulatory agenda, including the transition and shift from the regulatory policy of the Clinton administration to that of the Bush administration. I also held a number of positions on Capital Hill, in both the House and the Senate, and so I am honored to have the opportunity to return here and testify before this august body.

In my various positions in the previous administration, I worked a great deal on the regulatory process, as an agency staffer, as a White House aide working closely with the Office of Management and Budget and OMB's Office of Information and Regulatory Affairs on regulations, and as the number two official at HHS, our largest civilian agency, with a huge regulatory impact. In my time in government, I saw how important the agency regulatory staffers, the Administrative Procedures Act, and especially the expert staff at OIRA are at ensuring that all of the appropriate voices are heard in coming up with workable regulations. All of these entities are designed to work against the inappropriate "capture" of any one interest of the regulatory process.

It is clear that there are interests out there – not just industry, but also unions, non-profits, and interest groups – who would be happy to "capture" the process, and would derive benefit from doing so. Of course, were any of these entities to succeed in capturing the process, it would not benefit the public interest and, ultimately, would likely not even



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benefit the interest of the narrow group. If, for example, unions captured a process and crafted a regulation that gave them everything they sought in a particular process, and in doing so, drove the regulated industry out of that market, none of the players would benefit.

Still, that does not mean that "capture" is not attempted. The public choice problem is a reality – certain actors do have greater interest and put more effort into shaping specific regulations. In addition, the problem described by public choice theorists is not unique to the administrative state. To the extent that the regulated actor puts more time and energy into influencing the regulatory process, that is a simple function of his superior economic incentives to expend limited resources in the effort. This continues to be the case with both legislation and regulation. The phenomenon of attempted capture is at its heart that of a virtually intractable aspect of human behavior interacting with ever expanding spheres of governmental influence. Recognizing this, it is also important to remember that the universe of actors seeking to influence the process includes not only the regulated industry but also NGOs, think tanks, interest groups, and unions, all of which can represent competing and often equally narrow perspectives, and do not always have the public interest in mind.

In my experience, government officials, political and career alike, were aware of and on guard against these competing interests. They saw their role as the referees who will take the information from the competing interests and, using the rule book of the APA, govern the process so that capture does not take place. In my experience, both political and career regulatory officials were cognizant of the need to avoid both bias and the appearance of bias. I certainly did not see any indication of career staff at the agencies I worked with being pro-business activists. To the contrary, people in industry often thought that the opposite was the case – that career staff would not give them a fair shake. And certainly, there have been and continue to be plenty of rules that business does not like, in both Democratic and Republican administrations.

Political staffers of both parties often enter government thinking that the career staff will have a pro-Democratic or anti-Republican orientation. In my experience, I found something quite different. The career staffers were neither pro Democratic nor pro Republican. To the extent that they were biased, it was in favor of the interests and prerogatives of their specific departments. At times, this meant that they lacked a sense of the larger picture, but at all times they wanted to protect their agencies, and guard against potential embarrassment or weakening of the agencies to which they had dedicated their careers.

Another important factor to consider is the fact that all of the agencies, and the entire regulatory process, are subject to significant oversight, from their own Inspectors General, multiple Congressional committees, and from the GAO. I found that Congress, in particular, is watching very carefully and quite vigilant with respect to oversight. In addition, the press provides an additional level of scrutiny, and regulatory staffers are aware of all of these eyes watching them. If regulatory officials were to accept input



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from only one particular interest, it would also mean that all of the various watchdogs were not doing their jobs.

Another important consideration is that the risk of capture is not a one way street. The problem can be of significant weight on the other side as well. With respect to the current administration, for example, I have never heard any accusation that their appointees are too "pro-business." There are various economic and ideological interests at play in regulations, and it is the role of the staff at the agencies, political and career alike, to be fair-minded, and to make sure that the public interest, rather than special interests, are served. The late Senator Kennedy used to describe administration officials who came from industry as "foxes guarding the henhouses." But the same potential problem exists regarding individuals who come from interest groups or labor unions as well. Experts may come to government with preconceived notions, but once in government, it is their job to maintain the expertise, while dropping the preconceptions.

In fact, it is often helpful to bring in expertise from industry and other actors with real world experience, as they can help craft regulations with an understanding of how they will work in the regulated environment. This is true with respect to staffing and also with respect to outside advice. I have heard that the current administration is reluctant to seek insurance industry input in crafting health care implementation regulations because of the potential appearance of conflict of interest. If so, that would be a mistake, as the regulators would miss out on important insights from those who have been regulated.

Finally, and this may be a counterintuitive point, there is also the risk of regulatory capture going the other way. With respect to the FDA, for example, regulatory affairs folks in pharmaceutical companies are often fearful of the FDA and unwilling to challenge the agency, even in cases when it appears to overstep its bounds. This reluctance stems from the fact that industry representatives are quite eager to maintain good relations with the agency that is so important to their survival, and are loathe to challenge FDA for fear of earning the agency's ire.

In short, our system is imperfect, but it does have mechanisms in place to guard against hijacking from one particular part of the system. Regulatory officials, especially the broad-ranging, big picture experts at OIRA, work extremely hard to come up with fair solutions to difficult problems involving many competing interests. They may not always succeed, but I found that they are acutely aware of the problems they face.



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STATEMENT OF WENDY E. WAGNER
HEARING OF THE COMMITTEE ON THE JUDICIARY'S SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
"PROTECTING THE PUBLIC INTEREST: UNDERSTANDING THE THREAT OF AGENCY CAPTURE"
UNITED STATES SENATE
AUGUST 3, 2010

Dear Chairman Whitehouse and Subcommittee Members:

Thank you for the opportunity to submit a written statement for the hearing on "Protecting the Public Interest: Understanding the Threat of Agency Capture." My name is Wendy Wagner and I am the Joe A. Worsham Centennial Professor at the University of Texas School of Law. I have been studying federal regulation, particularly the area of health and environmental protection, for nearly twenty years and have published dozens of articles and several books on the topic. My current research focuses on capture in agencies arising from unintended consequences associated with administrative process.

I applaud the Subcommittee for exploring longstanding problems associated with regulatory capture and believe that congressional attention to the problem is long overdue given the adverse consequences to the general public. There is compelling evidence that legislative intent and statutory commands are being eroded and that this erosion is due in part to various overlapping forms of agency capture. In this statement I urge the Subcommittee to consider the larger picture of agency capture before settling on reform proposals. There are often multiple types and causes of agency capture operating simultaneously in any given area of regulatory dysfunction. Targeting only one type of capture runs the risk of missing a more comprehensive solution and could even make the problem worse.

**Different Types of Agency Capture**

Broadly construed, agency or regulatory capture occurs when regulatory parties benefit from systematic favors or favoritism from the agency charged with regulating them. Economists pioneered the concept of regulatory capture and have taken the lead in elaborating on the types and causes. This literature, which I oversimplify in order to extract useful insights, identifies at least three distinct, albeit overlapping types of agency



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capture that have quite different origins and hence may necessitate somewhat different reforms.

The first and most familiar type of agency capture is economic-based and involves financial inducements (i.e., the prospect of future employment, gifts, or bribes) from regulated industries offered in an attempt to co-opt individual regulators. See Table 1. A salient illustration of this type of agency capture is the Minerals Management Service (MMS's) cozy relationship with the oil industry, a relationship that fits this traditional profile: the oil industry offered future employment opportunities (the revolving door), provided various gifts, and nurtured supportive and even intimate relationships with individual regulators.[1] Like the occasional sex scandal, this type of isolated evidence of economic-based capture in government seems to surface at regular intervals and coincides with visible incidents of regulatory failure, although the causal attribution between the two can be murky.

A second form of capture, which I call politically-based capture, results from directives or actions by the President (or by individual members of Congress) to favor certain regulated parties in ways that go too far and contravene Congress' intent in the authorizing legislation.[2] These high level directives can take the form of specific instructions or more commonly arise from the selection of high level agency appointees with industry ties who are expected to advance the industry's interests in the agency's work. Politically-based capture is relatively easy to identify in its extreme form -- for example when government ethical codes are violated by high level officials who are overzealous in their efforts to advance a regulated party's interests. But short of this extreme, one partisan's idea of agency capture may be another's conception of the proper exercise of the Chief Executive's prerogatives. The accounts of political capture in the literature are anecdotal, and like economic-based capture, tend to border on the scandalous, such as the parallel investigations of Gale Norton and Julie MacDonald in their work at the Department of Interior during the Bush II Administration.



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**Table 1: Types and Causes of Agency Capture**

| *Type of Agency Capture* | *Target* | *Cause* | *Single illustrative Example* |
|---|---|---|---|
| Economic-based | Individual regulatory staff | Inducements, typically financial, from regulated parties | National Institutes of Health (NIH) employees moonlighting for drug industry (prior to 2005) |
| Politically-based | Entire agency or subunit of agency | White House (or individual congressman's) priorities carried too far | EPA under Burford & Lavelle |
| Institutionally-based | Entire agency as a result of institutional forces that inadvertently encourage an agency to favor regulated parties | 1) Intrinsic design of a regulatory program (i.e., permit fees fund the agency's program) encourages agency to lean in favor of regulated party<br>2) Unintended side effect of administrative process that allows resourceful stakeholders to gain control over agency decisions through information and the threat of judicial review | 1) Some agencies (i.e., MMS) are funded in part by fees generated from permit and related programs, which provide the agency with indirect rewards for furthering these arrangements with regulated parties.<br>2) EPA's air toxic emissions regulation reveal some evidence of bias towards industry as a result of the technicality and complexity of the regulatory decision and industry's skillful use of the comment process and threat of judicial review. |

A third form of capture -- institutionally-based capture -- is less well-formed in the theoretical literature and less newsworthy in intrigue, but it may be the most prevalent force causing agencies to favor regulated parties in ways that contravene Congress' intent in the authorizing legislation. A relatively unique form of institutionally-based capture – one in which fees paid by the regulated parties fund the regulators -- arises in a limited number of federal programs and may position the agency in a conflicted position with respect to the parties they regulate. For example, by basing an agency's funding on industry contributions obtained through permit fees, rental payments, and related charges, MMS as well as other agencies (i.e., FDA, OCC) administer programs that appear to provide these agencies with mixed messages regarding their mission –providing client



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services to industry versus regulating these parties in ways that promote public health and welfare. While this peculiar type of institutionally-based incentive may not be the sole cause of agency favoritism towards regulated parties, in cases where it occurs, it is often viewed as an important incentive leading to agency capture.

More commonly, institutionally-based capture arises from unintended consequences arising from the administrative process itself. For example, because the agency must respond to all comments, administrative law allows stakeholders with time and energy (which generally, but not always consist primarily of regulated parties) to effectively capture the agency by controlling their agenda, the framing of problems, the supply of information, and the issues on which the agency will be held accountable in the courts. Indeed, as this form of informational capture becomes more prevalent, it increases the costs of a rulemaking to the extent that only the most expert insiders can follow and process the information relevant to agency decisions. Public interest advocates, by contrast, tend to drop out of many rulemakings and devote their scarce resources to a subset of the problematic rules. See Figure 1. Even the most mission-oriented agency staffer who enters civil service specifically to advance the public interest may find he must tilt a decision in favor of industry and away from public health protection if he wishes a regulation to emerge from the process within a reasonable timeframe.

The root cause of this type of institutionally-based capture is the absence of controls on information excess, an unintended side effect of the design of our current administrative regime. Specifically, in U.S. administrative law, participants are not held to any limits on the information they file, nor in most settings must they assume any of the costs the agency incurs in processing their voluminous filings. Indeed, a variety of court rulings actually encourage regulatory participants to err on the side of providing far too much information, rather than too little. For example, administrative law instructs interest groups that if they plan to file comments that can be backed by legal challenge, then the comments need to cover the waterfront of their concerns and ideally to do so in detail. At the same time, administrative law places no restrictions on the size, number, detail, or technicality of the issues that can be raised – the sky is the limit. As a result, parties can inadvertently or deliberately exert substantial control over the agency's



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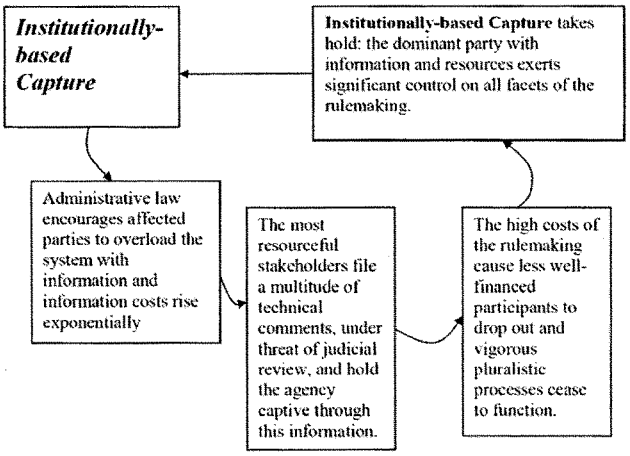
agenda in the number, diversity, detail, and even the framing of the multiple comments they lodge, as well as with the information they share earlier in the process. As long as the court reviews the agency's action based on an unlimited record that commenters have a hand in creating, information becomes almost akin to a choke collar that can be used, at the whim of interest groups, to control the agency's factual record and even its policymaking agenda.

**Figure 1: A Flow Chart of Institutionally-based Capture**




From the standpoint of a resourceful party, the ability to gain control of the rulemaking process through the use of excessive information may even be turned into a strategic advantage. Using technical terms and frames of reference that require a high level of background information and technical expertise, and relying heavily on particularized knowledge and technical terms-of-art, these fully engaged stakeholders can deliberately hijack the proceedings. Aggressively gaming the system to raise the costs of participation ever higher will, in many cases, ensure the exclusion of agency watchdogs that lack the resources to continue to participate in the process. Doing so all but assures that the aggressor will enjoy an unrestricted playing field and the ability to control the public input through all phases of the rulemaking life cycle.



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To make this abstract conception of institutionally-based agency capture more concrete, consider as an example a typical EPA rule promulgated in the mid-1990's regulating the emissions of toxic air pollutants from chemical storage tanks in tank farms at large petrochemical plants.[3] In this rule, the emissions standards were unusually straightforward – for most tanks, EPA required lids with tight seals to keep them from emitting significant quantities of toxic pollutants into the air. But this emissions standard did not resolve all critical regulatory issues; chief among them was how to make sure that these tanks would not leak if the seal became loose or worn. On this issue, EPA could have required the industry to install continuous emissions monitors at the rim of the tanks that would trigger an alert if a worrisome level of toxins was detected at the edge or over the surface of a tank. Or EPA could have required regular inspections of the tanks with a sniffer, much like those used by natural gas companies to detect gas leaks. Instead, in the final rule, EPA simply requires visual inspections by a company employee to ensure the seal is intact. With regard to the frequency of this self-monitoring, EPA could have required weekly or even monthly examinations given the seemingly low expense of the visual self-inspection; EPA, instead set the inspection interval at one year. Indeed, under the rule, if a leak is discovered in the course of this annual check-up, the company is given another 45 days to correct the problem, and the opportunity to self-administer up to two additional, 30-day extensions. And to complete the picture, records of the industry's compliance with these self-inspection requirements are stored onsite and are not filed with the state EPA.

How could these strikingly permissive enforcement requirements survive the fierce adversarial pressures of administrative rulemakings? The docket index, documents in the record, and proposed rule itself provide a clue. The proposed rule, which included three other subparts, was over 187 pages long. Just on the storage tank rule alone, EPA met with industry groups at least three times before publishing the proposed rule, communicated with them through letters, and prepared at least 15 background documents. After publication of the proposed rule, 22 industries and industry associations – nearly all of them household names – and a smattering of public interest advocates – more precisely, two public interest groups and four states or state regulatory associations -- engaged first in formal notice and comment and then presented their



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concerns at a public hearing. EPA's final rule that responded to comments identified more than 100 significant issues in contention. The final rule and preamble gained still more girth – this time reaching 223 pages and over 195,000 words in the *Federal Register*. With a statutory deadline looming, the agency pushed the process through in 3 and a half years from start to finish. However, because of a vocal constituency of unhappy interest groups, within 18 days after publishing the final rule, the EPA reopened public comment on one of the key issues in the rulemaking and received another sixty formal communications. Before it could issue a revised rule, one of the companies petitioned for reconsideration of the entire rulemaking. The agency ultimately issued a proposed clarification to the original rule two years later, received another 20 comments on its proposed clarification, and issued a final revised rule at the end of 1996.

Despite all of this activity, the final rule offers no explanation as to why the regulation of storage tank emissions is so lenient and provides no indication that any stakeholders were unhappy with the approach. One can surmise that there were simply too many battles – each of them intricate and time-consuming – for the two public interest representatives and four state regulatory groups to keep up with. One can also surmise that in slogging through more than 100 contested issues under a tight schedule, the agency itself had to tread lightly on issues for which the industry might have claimed superior knowledge. Alternatively, perhaps it threw bones to industry representatives as a way to get their buy-in on other issues, particularly when it suspected those concessions would not be caught or litigated by public interest groups who would be reluctant to delay the rule with litigation unless it involved a crucial issue cutting to the very heart of EPA's air toxic program. As the nation's top environmental lawyers, most of who worked first for EPA before advising industry, observe: "The reason that the Agency is generally receptive to well-reasoned technical comments [from industry] . . . is to withstand judicial review. The heart of a regulatory program is more likely survive over the long term."[4]

**The Consequences of Agency Capture**

The adverse consequences that flow from agency capture appear potentially significant, but have not been the subject of extensive empirical study. Even the long-



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accepted theory of economic-based capture is supported by only a thin body of empirical evidence, and this evidence suggests that economic-based capture is actually quite situational in occurrence. For example, a developing body of evidence now indicates that some agency staff, perhaps attributable in part to their agency culture, actively resist economic-based capture, making it a less important force in some regulatory settings than was previously supposed. Professor Steven Croley in particular has amassed compelling evidence in his book, *Regulation and Public Interests: The Possibility of GOOD Regulatory Government* (2008), that agency staff in highly salient decision settings tend to advance public interest goals despite strong industry resistance. Even within the economics literature, empirical studies point to the individual personalities of agency staff and the peculiarities of agency culture as important and perhaps overriding variables that determine the success of economic-based capture.[5] Having said this, when an industry has managed to infiltrate agency staff through financial and related inducements, some form of industry favoritism seems sure to follow, and in some settings this infiltration presumably could have catastrophic implications or at least impose high costs on the public interest. Whether in most agency settings economic-based capture will be the only or even the most important cause of evidence of industry favoritism, however, seems difficult to determine when other forms of capture are also present.

Evidence of public losses resulting from politically-based capture is similarly incomplete, with the starkest examples surfacing as public scandals.[6] As mentioned earlier, the problem with this form of capture lies in identifying the point at which true capture (i.e., industry infiltration) exists in ways that undermine public goals embodied in authorizing legislation, rather than simply advances Presidential policies to promote the economy. Political oversight, coupled with carefully selected judicial challenges, may be the best and probably the only means available to identify the public losses incurred when Executive discretion is carried too far.

Institutionally-based capture is more difficult to link causally to skewed regulatory outcomes, but evidence of such a link is gradually emerging from a growing body of empirical research on rulemakings. First and most notable is evidence of a "bias towards business" in diverse regulatory settings. In their study of rules promulgated by four different agencies from 1994 to 2001, for example, Yackee and Yackee find that the



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rules in all four agencies were changed in ways that favored industry after notice and comment.[7] Yackee and Yackee, as well other analysts, also find that regulated parties tend to dominate the notice and comment process in these rulemaking programs.[8] Public interest advocates, by contrast, participate in fewer rules – in some rulemaking settings less than half of the rules that would presumably be of interest to them. When public interest groups do participate, moreover, their comments are typically outnumbered, sometimes by more than ten to one, by regulated parties. Perhaps even more worrisome, the dominance of well-financed, regulated parties is not limited to formal participation opportunities but extends into phases of administrative policymaking that are often not open or transparent. This early involvement of the most aggressive stakeholders in the development of a rule, even when economic-based or politically-based capture is absent, results from institutional incentives: The agency must propose a rule that is essentially complete if it is to survive judicial review, and this is accomplished by working closely with the most vocal and litigious groups.[9] At this early stage of the rulemaking there is even evidence of regulated parties reviewing and redlining draft rules before they are made public and in rarer cases actually initiating first drafts of regulatory proposals that are ultimately used by an agency.[10]

Unfortunately, the cumulative toll on the public from these overlapping forms of agency capture is impossible to determine with precision. The Gulf oil spill, the economic crisis, evidence of under-protection of consumers and workers through a series of crises in food quality and consumer product regulation all demonstrate that the agencies are not adequately protecting the public as directed in their authorizing legislation. While sporadic evidence of agency coziness with industry may provide the most accessible explanations for these regulatory failures, in truth a larger constellation of institutional problems, including other forms of agency capture, are likely at work.

**Preliminary Thoughts on Reform**

In the aggregate, evidence that agency capture exists and may be undermining protection of the public interest seems beyond dispute. The need to reform this problem is pressing. But identifying effective reforms is challenging due to the overlapping causes as well as to the complexity of the system.



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Targeted reforms could be implemented to redress specific types of capture. Reforms of economic capture, for example, can be as straightforward as banning agency staff from engaging in outside consulting or holding major equity interests in companies that are the target of regulation. While these types of requirements do not eliminate the possibility of industry favoritism, particularly when it emanates from close relationships and repeated interactions between regulators and the entities they regulate, such restrictions do remove a rather obvious and unnecessary source of conflict of interest in agency staff.

In identifying reforms that target only a single type of capture, however, care should be taken to ensure that these targeted reforms are not missing other, more important causes of capture. A closer examination of MMS's permitting decisions, for example, might not only reveal evidence of economic-based capture, but also expose entrenched forms of institutionally-based capture as well. For example, even if MMS had no economic incentives to favor British Petroleum (BP), it remains to be seen whether public and regulatory oversight would have been sufficient – given limited resources of both the agency and public interest groups -- to ensure that the permit was not granted or was granted conditionally in ways that would have prevented or mitigated the disaster. If public advocates were not on hand to step up to the plate and challenge the permit decision, would MMS have had adequate resources to analyze and/or contest the industry's internally generated information in its permit application, particularly given the possibility of a resource-intensive legal appeal by industry? Even more doubtful, did MMS have the resources to develop its own data on key issues of concern that remain unanswered or suspiciously under-specified in BP's permit application? Thus, even without the economic and related incentives that seem to be present at MMS, the regulatory circumstances might still produce unduly lax permits when viewed from the standpoint of the authorizing statute.

Given the multiple causes of capture, the first step towards reform is to identify proposals that address all three types of capture at once, rather than remedy specific problems piecemeal. In surveying the general literature on capture, there is a recurring theme running through all three types of capture; namely, the agency is operating in a regulatory setting that is highly complex, technical, and for which the benefitting industry



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has superior information that gives them a significant advantage over other regulatory participants.[11] The resulting regulatory opacity creates conditions where the agency often ends up working almost exclusively with the parties it regulates. In this darkened regulatory setting, some agency staff may be more easily co-opted by financial inducements or certain political directives may be taken too far. Even for agencies that are largely impervious to these economic- or politically-based forms of capture, however, agency staff may find they must still tilt the rulemaking project in favor of regulated parties due to the unintended incentives embedded in administrative process. Specifically, if regulated parties are the dominant or sole participants in a complex rulemaking, then by default they will exert considerable influence over framing the rulemaking exercise and providing the bulk of the information and analysis that informs the regulatory decision. In such settings, moreover, industry will be the primary or even the exclusive party filing comments or threatening judicial review against rules they find objectionable. Their powerful presence through all stages of the rulemaking is often not opposed or questioned, except by overworked agency staff. Moreover, even when they do learn of problems, external watchdogs are precluded from challenging rules if they failed to file comments during the notice and comment period since they did not exhaust their administrative remedies.

A general antidote to this type of under-the-radar, one-sided regulatory process is to inject into the agency's decision-making process a dose of skeptical oversight from a more disinterested expert vantage point. In some rulemakings, public interest groups and state and local regulators already play this skeptical role. But in other rulemaking decisions (and perhaps the majority), a quick review of the administrative docket will likely reveal that there has been effectively no external oversight of a regulator's decision; the rulemaking has devolved essentially into a negotiation between an agency and the parties they regulate, with the regulated parties able to sue if they do not like the final regulatory product. A mandatory skeptical review conducted by outside disinterested experts who are not concerned about the potential for judicial review (perhaps assembled under FACA), for example, could provide a fresh critical eye and an adversarial check on the voluminous comments coming primarily from industry participants.[12] There are undoubtedly many other ways to accomplish these ends, such as



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subsidization of agency watchdogs or more proactive use of internal or external investigative offices. One conclusion is clear, however: simple assurances of transparency and equal access provided by administrative law are not sufficient, by themselves, to prevent agency capture. More vigorous methods of agency oversight are needed to level skewed processes when regulatory programs are extremely technical and complex and hence opaque to virtually everyone but the groups they regulate.

**Conclusion**

Given the overlapping types of regulatory capture at work in many agencies, the most successful reform efforts will be those that attempt to counteract all forms of capture simultaneously, rather than reforms that target only one of the many types or symptoms in piecemeal fashion. To that end, the deployment of processes for instituting more critical oversight over agency technical decisions that might otherwise fall under the political and legal radar may be one of the most effective, initial steps towards redressing the overarching problem of agency capture.

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Thank you again for the opportunity to participate in today's hearing. If I can be of further help, please do not hesitate to let me know.



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**Endnotes**

[1] See, e.g., Ernesto Dal Bo', Regulatory Capture: A Review, 22 Oxford Review of Economic Policy 203 (2006).

[2] Politically-based capture has also arisen when a powerful congressman wields a threat of reducing appropriations to an agency subunit if the agency declines to grant favors to the congressman's pet constituency.

[3] 40 C.F.R. § 63.100 – 183.

[4] Andrea Bear Field and Kathy E.B. Robb, "EPA Rulemakings: Views from Inside and Outside," 5 Natural Resources and Environment, Summer 7 (1995).

[5] See, e.g., Toni Makkai & John Braithwite, In and Out of the Revolving Door: Making Sense of Regulatory Capture, 12 Journal of Public Policy 61 (1992).

[6] See, e.g., Jonathan Lash et al., A Season of Spoils: The Story of the Reagan Administration's Attack on the Environment (1984).

[7] See Jason W. Yackee and Susan W. Yackee, A Bias toward Business? Assessing Interest Group Influence on the Bureaucracy, 68 Journal of Politics 128-39 (2006).

[8] This evidence is summarized in Rena Steinzor & Sidney Shapiro, The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment at 45-46 (2010).

[9] *See, e.g.*, Shell Oil Co. v. EPA, 950 F.2d 741, 757-63 (D.C. Cir. 1991) (holding that agency failed to provide meaningful notice and comment opportunities on issues in the final rule; the issues were raised by commenters during the notice and comment process); Environmental Integrity Project v. EPA, 423 F.3d 992 (D.C. Cir. 2005) (vacating EPA rule setting forth monitoring requirements because the agency "flip flopped" after notice and comment and the final rule was not a logical outgrowth of the proposed rule, thus violating the notice and comment requirements of the APA).

[10] This evidence is summarized in Wendy Wagner, Administrative Law, Filter Failure, and Information Capture, 59 Duke L.J. 1321, 1380-88 (2010).

[11] See Dal Bo', supra, at 220.

[12] Many academic commenters have expressed concerns that judicial review has become counterproductive in its impact on agency decision-making. It is possible that increases in these more political methods of oversight may alter the regulatory landscape in ways that justify less and possibly much less judicial review of agency rules. It may also be possible that judicial review, regardless of the suggestions made here, may be a contributing cause of capture that deserves separate, focused congressional attention.



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