

1                   REGULATORY CAPTURE IN THE 21st CENTURY

2                                   MARCH 3, 2016

3                                   9:30 a.m. - 12:20 p.m.

4                                   Dirksen Senate Office Building

5  
6                                   OPENING REMARKS BY

7                                   SENATOR SHELDON WHITEHOUSE

8                                   SENATOR MIKE S. LEE

9                                   SENATOR ELIZABETH WARREN

10  
11                                   PANELISTS

12                                   GRETCHEN MORGENSON

13                                   BRANDON GARRETT

14                                   HON. RONALD CASS

15                                   HON. JED RAKOFF

16                                   DANIEL CARPENTER

17                                   SIDNEY SHAPIRO

18                                   STEVEN CROLEY

19                                   NEOMI RAO

20                                   MARK CALABRIA

21  
22  
23  
24                   Reported By: Steven Poulakos

25                   Job No: 104401

## 1 Regulatory Capture Forum

## 2 PROCEEDINGS

3 MR. WEINER: Good morning. Are you able to  
4 hear me? I am Matt Weiner, the executive director of  
5 the Administrative Conference of the United States  
6 which is often called ACUS. I'm joined today by the  
7 ACUS staff and several members of the ACUS assembly,  
8 two members of ACUS's counsel, Ron Cass and our  
9 vice-chairman Steve Croley, both of whom will be  
10 moderating rating our panels today, and finally the  
11 second most famous former chairman of the  
12 administrative conference, Paul Verkuil, who led the  
13 rebirth of the conference in 2010.

14 Our most famous former chairman is the late  
15 Anthonia Scalia, and if I may, let me just pause for a  
16 second and say that we'll always be very grateful for  
17 Justice Scalia, not only while he was its chairman, but  
18 also later as the Supreme Court Justice.

19 I would encourage you to visit the tribute  
20 to Justice Scalia on our website where you'll find his  
21 as well as Justice Breyer's 2010 congressional  
22 testimony in support of ACUS.

23 Thank you for joining us for today's forum.  
24 We hope that it will not only inspire a productive  
25 bipartisan dialogue about the subject of regulatory

## 1 Regulatory Capture Forum

2 capture, but also that it will inspire those of you who  
3 are unfamiliar with ACUS's work to follow us and become  
4 involved in our work.

5 I won't stand between you and Senator  
6 Whitehouse any longer except to thank first Senator  
7 Whitehouse's and Senator Lee's staff, in particular  
8 Lara Quint and Sara Malwalze and Will Levi for helping  
9 us get this program off the ground this morning.

10 And, secondly, the House and Senate  
11 judiciary committees and their staffs who were there  
12 providing support of ACUS support, and finally Senator  
13 Whitehouse himself for suggesting this forum and  
14 otherwise contributing to our work.

15 SENATOR WHITEHOUSE: In the course of my  
16 life I have been an advocate in state and federal  
17 regulatory proceedings. I have served as a regulator,  
18 as both RI's director of business regulation and to a  
19 degree when I was Attorney General, and I have been  
20 both United States Attorney and Attorney General in  
21 seeing the prosecuting side.

22 So regulatory law is an area of long and  
23 considerable interest to me, and the threat of capture  
24 of regulatory agencies has long been a concern.

25 So I asked Director Donovan last year how

## 1 Regulatory Capture Forum

2 we might do a better job of identifying and routeing  
3 out special influence within our agencies. Director  
4 Donovan listened and took the question right to the  
5 experts. I look forward to hearing what they have to  
6 say during the course of the day.

7 For my part, let me dare to open with a  
8 word of gratitude for regulation. Medicines are not  
9 snake oil mysteries any longer. People are rarely  
10 burned or killed in boiler explosions.

11 Automobiles have seat belts and airbags.  
12 Smokestacks have pollution controls. Stock jobbers  
13 have a harder time bulking innocent investors. Most  
14 insurance policies actually pay when the insured risk  
15 occurs.

16 Quacks and barbers can't be doctors. We  
17 take for granted the safety and reliability that a  
18 regulated world has built.

19 I think we also take for granted that  
20 regulation helps further our economic progress.  
21 Regulation help channel America's competitive  
22 enterprise into strong and valuable innovations instead  
23 of new tricks and traps for consumers or new ways of  
24 cutting corners.

25 Confidence in our industries grows when

## 1 Regulatory Capture Forum

2 consumers know they can count on the safety and  
3 reliability of the product. Ask yourselves whether or  
4 not the American pharmaceutical industry would be a  
5 world powerhouse if patent medicine hucksters were  
6 still allowed to operate?

7 Regulation sets a positive frame for  
8 economic growth, and where they are common goods  
9 shared, like clean air, streams and oceans and  
10 unpolluted skies, there is always a perverse economic  
11 incentive to abuse such resources, leaving us all  
12 poorer. This is the principal described in Garrett  
13 Hardin's famous Tragedy of the Commons. Regulation is  
14 what constrains this perverse incentive and protects  
15 precious common resources.

16 Critics of regulation often argue that  
17 regulation can be overbroad, out of date, ineffective,  
18 or unduly burdensome. Of course that is true. Error  
19 and obsolescence occur in any human endeavor.

20 To maximize the economic benefit of  
21 regulation, we have to keep regulations efficient and  
22 up to date.

23 But my political experience is this: When  
24 the deregulatory crowd shows up to put this principal  
25 into practice and to champion the notion of burdensome

## Regulatory Capture Forum

1  
2 regulation, the target is usually not some obsolete or  
3 inefficient technical regulation that probably needs  
4 updating.

5 In my experience, the targets have been the  
6 Clean Air Act, or the ban on insurance companies  
7 denying coverage to people with preexisting conditions.  
8 These restrictions keep Wall Street from disrupting the  
9 economy again.

10 So we have to be careful about not  
11 confusing a concern about burdensome regulation with  
12 licensing the worst abusers to go after the common  
13 will.

14 On the other side, there is a threat that  
15 is at least as great as burdensome regulation, which is  
16 the threat of regulatory capture. For example, when  
17 powerful interests gain improper influence over  
18 regulatory agencies.

19 The consequences can be catastrophic, as we  
20 saw in the Minerals Management Service and the BP oil  
21 spill, in the mine health and safety, administration  
22 and the SAGO Mine disaster, and in a sweep of financial  
23 regulators in the runup to the global financial melt  
24 down of 2008.

25 In each of these cases, and in others,

## 1 Regulatory Capture Forum

2 regulatory agencies overly beholden to the regulated  
3 industries failed to protect the American people, and  
4 the consequences were very, very grave.

5 Fundamentally, agency capture assaults our  
6 democratic American government. It is "we the people"  
7 who pass laws through a democratic and open processes.  
8 Elected representatives fight for the public's will,  
9 and regulations enforce laws to protect the public  
10 interest. All is well until industries creep in,  
11 co-opt and control those regulatory agencies. When  
12 they do, the agencies are pried out of the matrix of  
13 our government of laws to become servants of industry  
14 and the public's voice, and the democratic process is  
15 lost.

16 The problem of regulatory capture has long  
17 been recognized. Woodrow Wilson explained more than  
18 100 years ago, if the government is to tell big  
19 businessmen how to run their business, then don't you  
20 see that big businessmen must capture the government in  
21 order not to be restrained too much by it.

22 Regulatory capture has been discussed in  
23 the research of Nobel Laureate George Stigler in  
24 innumerable textbooks and horn books in administrative  
25 law and economics, even on the opinion pages of the

## 1 Regulatory Capture Forum

2 Wall Street Journal.

3 Although the problem of capture can at  
4 times seem intractable, while at a judicial  
5 subcommittee hearing I chaired several years ago, I  
6 found broad, bipartisan agreement on a number of  
7 propositions.

8 Here's what everyone conceded. First,  
9 agency captures a real phenomenon and a threat to the  
10 integrity of government. Second, the enormous stakes  
11 involved for regulatory entities create a powerful  
12 incentive to gain over regulators influence.

13 Third, most regulated entities have both  
14 organizational and resource advantages in the  
15 regulatory process compared to public interest groups  
16 that represent a diffuse public interest.

17 Fourth, the regulatory process, not the result,  
18 the process itself, can be gained by regulated entities  
19 allowing them undue control and influence over  
20 regulation. For example, a regulated entity can  
21 overwhelm an agency with comments, delay, or perhaps  
22 even halting its regulatory process.

23 Fifth, regulatory capture by its nature  
24 happens in the dark, done as invisibly as possible. No  
25 capturer plants a public flag on an agency that they



## Regulatory Capture Forum

control.

Sixth, the potential damage from agency capture, as we have seen, is enormous, and finally effective Congressional oversight can keep regulators focused on the public interest and defend against capture.

Given the general agreement on these propositions and given the sense of academic history on regulatory capture, it is surprising to me how little attention has paid by Congress. My first question in preparing a hearing was: What previous hearings have there been whose record we can build on, and after due exploration the answer came back, none. There is a surprising lack of practical study of regulatory captures symptoms, its defects, and its cures, and there is virtually zero government effort to systematically identify it, prevent it, and root it out.

We respond episodically after a captured disaster, but no one in the United States government has the job of seeking to define, and locate, and prevent, and cure regulatory capture.

This weakness needs to be addressed. It is a matter of simple good government and it need not be a

## 1 Regulatory Capture Forum

2 partisan issue. Whether you think that agency capture  
3 is a symptom of excessive or inadequate regulation,  
4 whichever economic interest you think poses the  
5 greatest risk of capture. And however you think  
6 capture should be resolved the process of making  
7 government work well is one area in which we ought to  
8 have common cause.

9 I'm delighted that ACUS has provided this  
10 opportunity for a real discussion of what regulatory  
11 capture looks like and how best to confront it. I look  
12 forward to the remarks of my colleagues, Senators Lee  
13 and Warren, and to the insights of the two expert  
14 panelists on the role of capture in both rule-making  
15 and enforcement settings.

16 So thank you all for your interest. I hope  
17 that we are embarked on a journey that may take some  
18 time, but that will lead to a destination where there  
19 actually are results.

20 I thank you very much.

21 UNIDENTIFIED SPEAKER: Any questions for  
22 the Senator?

23 SENATOR WHITEHOUSE: I'm from Rhode Island.  
24 I don't just take questions, I take comments and rude  
25 remarks. (inaudible)

## Regulatory Capture Forum

1  
2           ATTENDEE: So as you pointed out,  
3 regulatory capture has been identified problems for  
4 several decades now, and one of the initial responses  
5 to the problem was to create new procedures in certain  
6 ways that mitigate or prevent regulatory capture, for  
7 example, something like the notice; but as you also  
8 pointed out in your comments, those processes  
9 themselves have been capture by (inaudible). And  
10 comments, so I guess procedural solution to regulatory  
11 capture is that real capture itself and what  
12 preventative steps can we take to address that problem  
13 as we seek out new solutions --

14           UNIDENTIFIED SPEAKER: I don't know that  
15 it's easy to find a process solution that can itself be  
16 gained. As a general proposition transparency is a  
17 good thing, but transparent comments entered by the  
18 millions can jam up the regulation and allow the status  
19 quo to be promulgated, and there transparency didn't  
20 help you. So it's not final answer.

21           I would like to speak to someone, perhaps  
22 at OMB or perhaps a roving inspector general for  
23 capture, who has the task of creating a matrix of  
24 warning signals of regulatory capture.

25           I think in this room we can agree on a

## 1 Regulatory Capture Forum

2 number of them off the top of our heads. How much  
3 money flows through or is affected by a particular  
4 body. How isolated the small body itself is. If  
5 there's no real public interest in what it does other  
6 than that industry and it has a huge economic effect on  
7 the industry that (inaudible) proposition, a chart of  
8 what the turnover is between industry and the  
9 leadership of the agency, continuing examination of  
10 whether there are improper benefits going back and  
11 forth.

12 We should have known in advance that MMS  
13 folks were being taken on shooting trips and having  
14 drug and hooker parties and being flown to the Peach  
15 Bowl on private aircraft, and examining rigs owned by  
16 companies with which they had an employment application  
17 pending before the whole damn thing blew up; but it was  
18 really nobody's job to look for that, and if you are  
19 the agency, then it's embarrassing to point that stuff  
20 out, it's bad for (inaudible). You can be isolated and  
21 squeeze that agency, and so it's got to be somebody  
22 else's job to be the bad guy.

23 So those are some of the thoughts that I  
24 have, but I think you can't cure it through process  
25 alone. It's got to be somebody's job to say where the

## Regulatory Capture Forum

1  
2 places we need to work are, and then make a public  
3 report and listen in the same way that National  
4 Transportation Safety Board does after a plane wreck or  
5 something, like what went wrong, go back and do your  
6 report of what went wrong, those kids that got  
7 incinerated. There's a pipeline leaks was completely  
8 taken over by the pipeline companies.

9           It shouldn't be that hard. If we can find  
10 Osama Bin Laden, we ought to be able to find regulatory  
11 capture.

12           ATTENDEE: Well, I appreciate those  
13 examples of what I think are outright examples of the  
14 definition of regulatory capture. I wonder whether  
15 your conception of capture also includes areas where  
16 rules are really not as predictive in keeping up with  
17 the special intent around environmental and health and  
18 safety objectives as they might be.

19           In other words, capture seems everlasting,  
20 but there seems like about a spectrum.

21           UNIDENTIFIED SPEAKER: In that matrix we  
22 could easily have an independent review of what  
23 appeared to the independent reviewer to be  
24 Congressional intent and compare that to what the  
25 agency is doing, at least to bring to light that our

## 1 Regulatory Capture Forum

2 reading of the statute is that it should be X, Y, and  
3 Z. Their reading is only A, B, and C. Is that a red  
4 flag? It's not final, but it can be added to the  
5 matrix (inaudible) of, and, yes, I agree with that.

6 And then look at the SEC right now. It has  
7 been captured completely, deliberately, and overtly and  
8 it's the intention of half of the commission's members  
9 to have it be, in fact (inaudible) that there's all  
10 sorts of ways it can happen.

11 ATTENDEE: Can I make one follow up on  
12 that?

13 UNIDENTIFIED SPEAKER: Yes.

14 ATTENDEE: What is your view of the  
15 appropriate role of the office in the infringement  
16 regulatory affairs, because as a public interest  
17 advocate in the regulatory process, we often find their  
18 hand behind things. This weakens the rules and creates  
19 that gap seen in the MS solution and I think it's time  
20 for an examination of the executive order (inaudible).

21 I would be open to that. It's a  
22 recommendation that I have made. I have clearly seen,  
23 particularly in environmental rules that were taken to  
24 OMB and put on the White House and left there to die.  
25 And so a process has been capture. We have been

## 1 Regulatory Capture Forum

2 advised by the political effort in the White House --  
3 it doesn't have to be an industry that captures the  
4 agency. It's truly supposed to be in foundation and  
5 having worked and stopped one of the environmental was  
6 an actually bipartisan with the Bush Administration the  
7 Obama Administration also (inaudible) article the way  
8 they sat on some of the these environmental when they  
9 matrix my want to protect. I see Senator Lee there and  
10 I don't want to keep you.

11 UNIDENTIFIED SPEAKER: (inaudible) (no  
12 microphone used)

13 SENATOR WHITEHOUSE: I don't think we can  
14 stop looking at the agency. I think if we had a good  
15 model we're looking at agency capture, the parallels  
16 next to what's happening in Congress on certain issues  
17 with some sharper relief, I think that would be good  
18 for the public. Thank you all very much and I welcome  
19 Senator Lee (applause).

20 CHAIRMAN VERKUIL: I would just like thank  
21 Senator Whitehouse for his illuminating remarks which  
22 have given us much to consider, and I'd now like to  
23 introduce our next visiting speaker, Senator Mike Lee.

24 Senator Lee is a member of the judiciary  
25 committee, a chairman of the subcommittee on antitrust,

## 1 Regulatory Capture Forum

2 competition policy and consumer rights as well as an  
3 accomplished appellate lawyer and public servant.

4 The Senator is also a friend of the  
5 administrative conference and participated in our last  
6 forum on criminal justice in the regulatory state.

7 Known for his rigorous focus on regulatory  
8 reform, the senator is working on a creative project to  
9 reinvigorate the Congress' role in the administrative  
10 state, and we look forward to his remarks. Thank you.

11 SENATOR LEE: Thank you very much, Chairman  
12 Verkuil, for hosting today's event. Thanks for all of  
13 you being here. Thanks to everyone involved in the  
14 Administrative Conference for the attention you've  
15 brought to the important issue of regulatory capture,  
16 and thanks for the invitation to let me come speak with  
17 you about this important issue.

18 It's not everyday that I'm invited to speak  
19 along-side my colleagues Senator Whitehouse and Senator  
20 Warren. On paper you might think that the three of us  
21 don't have very much in common, and yet here we are, to  
22 progressive democrats and one conservative republican  
23 speaking at the same venue on the same topic because  
24 we're committed to the same cause: Fighting regulatory  
25 capture in all of its pernicious forms.



## 1 Regulatory Capture Forum

2 This is a testament to the emerging  
3 consensus among policy makers, scholars, and activists  
4 on both sides of the political spectrum, and everywhere  
5 in between the consensus that sees regulatory capture  
6 for what it is, one of the most pressing political,  
7 economic, and indeed moral issues of our time.

8 But too often, especially on Capital Hill,  
9 this consensus tends to breakdown along partisan lines  
10 with members of both parties are often guilty of  
11 railing against regulatory capture, what is politically  
12 convenient for them, and looking the other way when  
13 it's not.

14 For betterment observers in Washington this  
15 pattern of very selective outrage may be predictable,  
16 but it doesn't make it productive nor does it mean that  
17 we simply have to tolerate it.

18 As I see it, the only way to truly combat  
19 and ultimately reduce regulatory capture is to end what  
20 I describe as the conspiracy of acquiescence that has  
21 influenced Senates, Houses and Presidents of every  
22 conceivable partisan combination.

23 There's no legitimate reason why some  
24 regulatory agencies should fall under intense scrutiny  
25 of their cozy and collusive relationships with

1                   Regulatory Capture Forum

2 regulated industries and special interests, while  
3 others are simply given a pass.

4                   If we oppose regulatory capture within the  
5 Securities and Exchange Commission or within the  
6 Federal Reserve we must also oppose it within the  
7 Environmental Protection Agency and the Federal  
8 Communications Commission.

9                   Likewise if we oppose regulatory capture  
10 when it leads to the selective under-enforcement of  
11 agency rules we must also oppose it when it produces  
12 excessive regulations that distort markets and protect  
13 incumbents.

14                   This is the approach recommended in the  
15 collection of essays that inspired today's event,  
16 preventing regulatory capture.

17                   In this volume's introduction Senators  
18 Daniel Carpenter and David Moss provide a useful  
19 definition of this the phenomenon, one that accounts  
20 for its variety, its scope, and its many forms.

21                   As the authors put it, regulatory capture  
22 is the result or process by which regulation in law or  
23 application, is consistently or repeatedly directed  
24 away from the public interest and towards the interest  
25 of the regulated industry by the intent and action of

## Regulatory Capture Forum

1  
2 the industry itself. But it's not just private  
3 for-profit companies that engage in regulatory capture.  
4 Carpenter and Moss are quick to point out, it's not  
5 just possible, but common for special interests, other  
6 than regulated industries, to capture a regulatory  
7 agency.

8 In fact, labor unions and nonprofits, no  
9 less than wealthy corporations and Wall Street  
10 megabanks, are capable of and interested in capturing  
11 regulators in order to advance their own narrow focused  
12 interests. In other words, regulatory capture,  
13 properly understood, is a symptom of the perennial  
14 tension between the public interest and the cacophony  
15 clashing private interests at the heart of our  
16 republic.

17 James Madison called the inevitable  
18 conflicts that arise from this tension, "The mischiefs  
19 of factions," and he believed, along with the other  
20 framers, that the American constitution was uniquely  
21 equipped to limit the power and influence of special  
22 interests factions that would otherwise tug at and  
23 exert an enormous amount of pressure on the fabric of  
24 our society. At the core of the founders'  
25 constitutional design are two basic fundamental

## Regulatory Capture Forum

1 principles.

2  
3 First, the laws that govern a nation and  
4 direct its economy should be written by people who are  
5 elected by-and-therefore, stand accountable to the  
6 public. That's why Article 1 of the Constitution, in  
7 fact, Article 1, Section 1, Clause 1, the very first  
8 operative provision of the entire document itself  
9 grants all federal and legislative powers specifically  
10 commerce. Why, because that's the branch of government  
11 that the framers properly understood as the most  
12 accountable to the people.

13 Today, we also have special interest  
14 factions, and the government privilege they seek in  
15 obscurity, whereas it's much more difficult to  
16 understand the public interest to undermine, rather,  
17 the public interest when policy and decision-making are  
18 both visible and accessible to the average citizen, the  
19 average voter.

20 Second, the powers of government should be  
21 separated so that the people who write the laws are not  
22 the same that as those who enforce the laws or  
23 adjudicate disputes that regarding the meaning of those  
24 laws.

25 When these powers are combined in a single

## 1 Regulatory Capture Forum

2 entity, when we fuse these powers, the incentives and  
3 the political rewards and regulatory capture increase  
4 traumatically in a way it's manifested on the public  
5 interest.

6 Our constitutional system was set up to  
7 operate according to these basic principals. this is  
8 not how the federal government works today. Today, you  
9 see, the vast majority of federal laws are not passed  
10 by the House and Senate and signed by the President.  
11 They're written by unelected bureaucrats, by a  
12 decision-making process that is opaque and highly  
13 technical.

14 Precisely the kind of venue is susceptible  
15 to capture by concentrated interest. As creatures of  
16 the Executive Branch, these bureaucrat agencies also  
17 have the power to enforce the very rules and very  
18 regulations that they themselves write, and, in many  
19 cases executive agencies wield a quasi-judicial power  
20 through administrative law judges.

21 Proponents of this combination of this  
22 insularity and centralized power within the executive  
23 agencies claim that these innovations on the framers'  
24 original design are necessary in order to protect it  
25 against regulatory capture, but this is an ironic

## Regulatory Capture Forum

1  
2 argument because experience has shown that precisely  
3 the opposite is true.

4 Concentrating the powers of the judge, the  
5 jury, and the executioner in a single government body  
6 made up of individuals who never stand for election  
7 creates an environment where there's an easy high-value  
8 target with special interest factions vying for access  
9 to the lever of power in pursuit of their own  
10 interests.

11 It's not that they're pursuing their own  
12 interest that's the problem. We've concentrated all of  
13 these talents in a limited, unique, and successful in a  
14 way that makes it far too easy for them, in fact,  
15 inevitable for them to manipulate those powers.

16 The point here is, of course, not to assign  
17 blame or to impugn the motives of any of the parties  
18 involved in regulatory capture. I know firsthand that  
19 the men and woman who run executive branch agencies as  
20 well as those employed by the industry's special  
21 interest groups affected by federal regulation, are  
22 themselves hard working, well intentioned, well  
23 educated and highly specialized.

24 The vast majority of the time, the parties  
25 involved in regulatory capture, are not themselves

## 1 Regulatory Capture Forum

2 corrupt, dishonest, or acting in any way that we can  
3 describe as illegal; but that's precisely the problem.

4 The status quo arrangement of incentives  
5 and power within the modern administrative state has  
6 made regulatory capture all but inevitable. It just  
7 gives, it gives by virtue of the way that it's set up  
8 of the structure.

9 The American constitution was written by  
10 people who understood, as James Madison wrote in The  
11 Federalist Papers, that the latent causes of faction  
12 are so into the nature of man.

13 So the constitution for that very reason  
14 establishes a system that divides government and makes  
15 lawmakers dependent on the people in order to make it  
16 as difficult as possible for the mischiefs of faction  
17 to systematically direct the law away from the common  
18 good.

19 The modern administrative state flips this  
20 theory on its head, consolidates power, and assumes  
21 that good intentions will always overcome the latent  
22 causes affection.

23 This upending of our constitution quarter  
24 was not accidental and it didn't just happen overnight.  
25 Over the close of the 20th century, and accelerating

## Regulatory Capture Forum

1  
2 into the 21st, Congress has steadily and voluntarily  
3 and quite deliberately surrendered its constitutional  
4 law-making power and its responsibilities to the  
5 Executive Branch.

6 One of the unintended, but absolutely  
7 undisputable, consequences of Congress recasting itself  
8 as the backseat driver in American government.

9 It's been to move the bulk of law making  
10 into bureaucracy where the opaque and highly technical  
11 decision-making process facilitates regulatory capture  
12 by concentrated interest.

13 This has led not only to bad policy, but in  
14 inexorably to greater public distrust for our  
15 government institutions. So it should come as no  
16 surprise that the movement against regulatory capture  
17 is gaining a whole lot of momentum at this precise  
18 moment in our nation's history.

19 If there's one thing we know about American  
20 politics today, one thing that we can all agree on is  
21 that there is a deep and growing distrust between the  
22 American people and our political system in Washington.  
23 No matter where they live or which party they support,  
24 most Americans no longer believe that we have a  
25 government of, by, and for the people, and in many



## Regulatory Capture Forum

1 cases they're right.

2  
3 Increasingly what we have today is a  
4 government of unelected officials with a degree of job  
5 security that would make tenured professors seem  
6 envious. A government by well-connected market  
7 incumbent and fashionable special interests, and a  
8 government for the benefit of political and economic  
9 elites.

10 Regulatory capture has played an important  
11 role in building today's discredited status quo, and  
12 just as importantly in insulating it from reform and  
13 insulating it from the very dynamics in our society.

14 So any efforts to win back the trust of the  
15 American people, as both political parties surely hope  
16 to do in years ahead, must include as a part of its  
17 agenda an effort to rein in the agencies and to  
18 regulate the regulators.

19 The goal of our reforms can't be to target  
20 (inaudible) or another while leaving untouched the  
21 dysfunction and culture of capture throughout the rest  
22 of the bureaucracy. We need to elevate personal over  
23 party and pursue structural reforms that make Congress  
24 once again responsible both in the sense of discharging  
25 its constitutional duties and also in the other equally

## Regulatory Capture Forum

1  
2 important sense of making it directly accountable to  
3 the people.

4 Two such reforms that I support and call to  
5 your attention today are the Reins Act and the  
6 Regulatory Accountability Act. I say Act in an  
7 aspirational sense here.

8 These are bills not yet laws but, bills we  
9 hope one day that they will become laws. Each in his  
10 own regulatory agencies and the rules they issue under  
11 closer Congressional supervision, which is to say, it  
12 would make what is now a headless fourth branch of  
13 government accountable once again to the American  
14 people.

15 These are not partisan proposals and  
16 there's no good reason why they can't achieve the  
17 support of both political parties. Strengthening  
18 Congress so that policymaking is more transparent and  
19 more accountable to the public is not itself a partisan  
20 project. It's about putting the federal government  
21 back to work for the American people.

22 This is the goal that I share with Senator  
23 Whitehouse and Senator Warren and I share in common,  
24 even though we may not always agree on exactly how to  
25 get there, and it's that common commitment to restoring

## 1 Regulatory Capture Forum

2 a government of, by, and for the people that gives me  
3 hope for the future of the country and for the future  
4 of our collective fight against the phenomenon of  
5 regulatory capture.

6 Thanks to all of you for all you do in this  
7 effort. I look forward to working with you in the  
8 months and years ahead and look forward to achieving a  
9 degree of victory in this area.

10 Thank you very much.

11 UNIDENTIFIED SPEAKER: I move directly to  
12 our first panelist.

13 UNIDENTIFIED SPEAKER: While regulatory  
14 enforcement is usually defined in terms of the  
15 enterprises that adopt regulations, there's also a side  
16 of the capture equation that deals with the enforcement  
17 of regulation, and even though this is not thought of  
18 as commonly, it is often the part that gets criticized  
19 in public when you ask why wasn't a prosecution brought  
20 or why was it brought, why was this particular  
21 punishment handed out, or why was it not given.

22 Senator Whitehouse asks that we take a look  
23 at the practical sides of things. So we have assembled  
24 a panel that includes an academic, a journalist, and a  
25 judge, three people who, of course, have the most

## 1 Regulatory Capture Forum

2 practical jobs you can think of. They also happen to  
3 be experts in the area. I'm going to introduce them  
4 briefly and then turn the program over to them and then  
5 we'll have a discussion among ourselves.

6 First you'll hear from Brandon Garrett who  
7 was Just Thurgood Marshall's professor of law at the  
8 University of Virginia. Professor Garrett is also the  
9 author of two extremely successful books, the Harvard  
10 University Press, one Convicting the Innocent, and the  
11 other called Too Big to Jail. We expect these to be  
12 made into major motion pictures at some point in the  
13 near future. You will see that he is somebody that  
14 publishes at the Harvard University Press and other  
15 university presses. You can tell a book is a success  
16 when it's bought by someone outside of the immediate  
17 family. It's very important that those of you write  
18 down the titles of the books we mention today and go  
19 out and buy them immediately after.

20 Our next speaker will be Gretchen Morgenson  
21 who is a book business financial editor and columnist  
22 at the New York Times. She's also a Pulitzer prize  
23 winning reporter, and her book, Reckless Endangerment  
24 deals with the role of Fannie Mae and the run up to the  
25 financial crisis.

## 1 Regulatory Capture Forum

2 Our next speaker will be Judge Rakoff of  
3 the U.S. District Court, the Southern District of New  
4 York. Judge Rakoff is extremely well-known and he is  
5 often accused of being an academic masquerading as a  
6 judge because of his many writings and his deep  
7 learning. I think actually that he was persuaded that  
8 the pay in academia was too high and he thought the  
9 judgeship was a suitable alternative. You can find his  
10 writings in academic journals as well as the pages of  
11 the New York Review of Books.

12 Let me turn this over first to Professor  
13 Garrett and then we'll go down the line and come back  
14 with questions.

15 PROFESSOR GARRETT: So my name is Professor  
16 Garrett. I teach at the University of Virginia in  
17 Charlottesville. It's somewhat sobering that this  
18 illustrious group -- and thank you for inviting all of  
19 us. It's sobering that this group decided to have  
20 Judge Rakoff and I here to talk about criminal  
21 prosecutions at an event on regulatory capture.

22 The last agency would one hope or expect to  
23 be influenced by special interests would be federal  
24 prosecutors, who are among the most powerful enforcers  
25 of their kind in the world.

## 1 Regulatory Capture Forum

2 Normal prosecutors normally follow akin to  
3 regulators enforcing policy. They enforce criminal  
4 laws and they put the bad guys in jail; but corporate  
5 prosecutions are more complex whether the target is a  
6 corporation itself or officers and employees, and they  
7 do serve regulatory roles.

8 I think it's a very good thing that the  
9 public is increasingly demanding greater accountability  
10 for corporate crimes. And to give an example, I'd like  
11 to briefly take the case of HSBC, particularly because  
12 that case unfolded here in the Senate in June 2002.

13 The soon to be former head of compliance at  
14 HSBC said this -- he was before the Senate subcommittee  
15 on investigations and he said, as I thought about the  
16 structural transformation of banks compliance  
17 (inaudible) the group that is, now is the appropriate  
18 time for me and for the bank or someone new to serve as  
19 "the head of group."

20 Basically his testimony began with, I quit.  
21 So the subcommittee's remarkable investigation -- he  
22 ends it, by the way, everything is going to be much  
23 better now that I'm not at HSBC.

24 The subcommittee turned up millions of  
25 pages of documents and produced lengthy reports, which

## 1 Regulatory Capture Forum

2 are available on line, and they uncovered not just a  
3 compliance problem or a weak anti-money laundering  
4 program at the multinational bank, but billions of  
5 dollars that had be diverted to a who's who of legal  
6 activities and organizations.

7 Mexican drug cartels with links to  
8 terrorism, sanctioned regimes and others. The scale of  
9 the violations was shocking and it could have resulted  
10 in any number of criminal cases and not just one.

11 Prosecutors described concerted efforts to  
12 hide dirty money transactions with e-mails and internal  
13 notes that the subcommittee here at the Senate turned  
14 up saying things like, care sanctioned country, do not  
15 mention our name in NY, or do not mention Iran.

16 So it's amazing what people put in the  
17 e-mail. When HSBC compliance officers raised alarms  
18 they were disgruntled or ushered out, and all of that  
19 was in wonderful e-mails that the subcommittee turned  
20 up as well.

21 Now, later in that year in 2012 HSB settled  
22 this case, one case, with prosecutors. Any number of  
23 the things described in the subcommittee reports could  
24 have supported and had a large criminal investigation.

25 The case was settled, so the banks were not

## Regulatory Capture Forum

1  
2 convicted of any crimes, and so individuals were not  
3 charged. This is criticized in editorial pages around  
4 the country, and by members of Congress, and the press.

5 That was the same day that prosecutors  
6 filed their case in the Eastern District of New York.  
7 They asked the judge to approve what is called a  
8 deferred prosecution agreement. Typically that is for  
9 low-level individuals, juveniles, first-time offenders.  
10 This case would be put on hold to give the bank a  
11 chance to show it's compliance.

12 Now, a money laundering conviction could  
13 have resulted in termination of the bank's U.S.  
14 charter. The bank was instead in charge of money  
15 laundering, it was charged with violations of the Bank  
16 Secrecy Act.

17 At the time Assistant Attorney General  
18 Lanny Breuer explained: Our goal here is not to bring  
19 it HSBC down, it's not to cause a systemic effect on  
20 the economy, it's not for people to lose thousands of  
21 jobs.

22 After the entry of this deferred  
23 prosecution settlement HSBC shares rose. Shares in the  
24 Senate on both sides of the aisle were calling it a  
25 "too big to jail" settlement.



## 1 Regulatory Capture Forum

2 Senator Grassley said functionally, HAASBC  
3 has quite literally purchased a get-out-of-jail-free  
4 card for its employees for the price of \$1.92 billion.  
5 Senator Jeff Merkley called it a "too big to jail"  
6 approach. Senator Elizabeth Warren stated that,  
7 evidently, if you launder nearly a billion dollars for  
8 drug cartels and violate our international sanctions,  
9 your company pays a fine and you go home and sleep in  
10 your own bed at night.

11 One of the most remarkable stories in all  
12 of American criminal law is the recent rise of the  
13 corporate prosecutions. I describe in my book, "Too  
14 Big to Jail", how billion dollar fines have become  
15 normal events. I assembled a vast database of  
16 corporate prosecution agreements and plea agreements  
17 from the past decade and beyond, all available online.  
18 This past year, 2015, corporations paid record sums  
19 exceeding \$9 billion in penalties to federal  
20 prosecutors.

21 Now, those remarkable stories (inaudible)  
22 recent rise of prosecutions. Gone not seek billed  
23 fines in appropriate criminal cases, such as the HSBC  
24 case, a decade ago and it is true that companies have  
25 obtained more and more in the way of financing every

## Regulatory Capture Forum

1  
2 year over the last decade.

3 This past year 2015 companies paid sums  
4 exceeding \$9 billion for penalties to federal  
5 prosecutors.

6 Now, companies cannot literally be put in  
7 jail, of course. And that is why adequately holding  
8 them accountable is so important. Responsible officers  
9 and employees can be targeted. Firms can be  
10 structurally reformed, but only if compliance  
11 requirements are taken seriously. Often they are  
12 generic and need not be audited. Firms can pay  
13 deterrent fines and compensate victims.

14 Yet many companies pay no fine, and even  
15 the biggest payments are often greatly discounted.  
16 More companies are not being prosecuted each year;  
17 fewer and fewer are prosecuted in federal court.  
18 Speaking of individual defendants, like in the HSBC  
19 case, almost two-thirds of those corporate prosecutions  
20 were not accompanied by any charges filed against  
21 employees.

22 The DOJ has accounted recent changes to  
23 focus more on individual investigations, in response to  
24 criticism. Although interestingly in the HSBC it is  
25 not over. It has been several years since the deferred

## 1 Regulatory Capture Forum

2 prosecution was entered, the DOJ is fighting release of  
3 the report of a monitor who has been supervising  
4 compliance.

5 The judge of Eastern District of New York,  
6 Judge Gleason, thought that it was in the public  
7 interest to publicly read a thousand page document  
8 describing several years of the agreement combined with  
9 (inaudible) at HSBC, and a concern that the systems are  
10 in place to prevent future crimes of the same type.

11 So perhaps more resources for corporate  
12 investigations, and more of a sea change in priorities  
13 is needed to end "too big to jail" once and for all.

14 I'll stop there, and I really look forward  
15 to discussing all of these issues and not just in the  
16 criminal areas.

17 UNIDENTIFIED SPEAKER: Thank you very much.

18 MS. MORGENSON: I'm Gretchen Morgenson.  
19 I'm reporter for the New York Times, and I discovered  
20 multiple crisis that have occurred and our financial  
21 markets since 1998. In the aftermath of the 2008  
22 financial crisis, Congress (inaudible) into act writing  
23 on legislation that was designed to insure income that  
24 such a devastating effect would never again occur.

25 Some 390 new rules have been written under

## Regulatory Capture Forum

1  
2 Dodd-Frank, and according to the latest pole, who's  
3 tracking on it, only 68 percent of (inaudible) by the  
4 end of 2015. The brief rules have not yet been posed  
5 at the end of last year, for the five years after  
6 Dodd-Frank.

7 Since writing the new rules have is  
8 complete, I know that (inaudible) hours will tackle the  
9 important issues of regulatory capture. By I do think  
10 statistics up to date illustrate a larger (inaudible).

11 While it's nice to believe that a rash of  
12 new rules will protect Americans from future bailouts  
13 and pricing, this is naive. Indeed one of the most  
14 evident things about our current regulatory regime,  
15 especially in the securities division, is the frequency  
16 with which regulators do not enforce the rules that are  
17 already on the books.

18 I'll refer to one particular instance of  
19 the (inaudible) factors of the SEC provide so-called  
20 wage earners to respondents in. By providing waivers  
21 to system regulations regularities are declining to use  
22 a powerful enforcement tool that could help.

23 Four years ago a former colleague of mine,  
24 (inaudible) was reporting that on the numerous cases  
25 for the SEC case (inaudible) institutions of half

## Regulatory Capture Forum

1  
2 (inaudible). As of now, there are 350 instances where  
3 the SEC provided (inaudible) attorney cost to firms  
4 that were such action to enforcement action.

5 And (inaudible) about that or JC  
6 MorganChase in settling six fraud cases they also  
7 approved 22 (inaudible)of regulation. In granting the  
8 waivers, the SEC, has apparently bought into the bank  
9 argument of, quote, strong record of compliance.

10 Even worse, half of the waivers identified  
11 in the report went to repeat offenders. Wall Street  
12 firms had settled some previously fraud charges, by  
13 agreeing to never violate the laws, the SEC regulators  
14 said (inaudible).

15 Among those security waivers are those that  
16 allow the SEC to continue to manage clients money.  
17 Another couple of examples would be well-balanced  
18 issuers of waivers which allow firms that have violated  
19 antitrust provisions of the securities laws to continue  
20 raising money to streamline stocks and (inaudible).  
21 Thankfully such waivers have recently grabbed the  
22 attention of Kara Stein, an SEC commissioner.

23 Lastly she instructed her (inaudible)  
24 waivers provided to JC Morgan, CVS, Barkley, Citi  
25 Group, and RMBS in a case involving manipulation of

## Regulatory Capture Forum

foreign exchange rates.

Saying that the special treatment has, quote, effectively rendered criminal convictions of financial institutions largely symbolic, she argued that with these tools, the SEC has the responsibility to assure that those lending institutions will create meaningful changes in their culture. Yes, we (inaudible) use them she says.

Now the SEC is often outmanned, outspent, outgunned. If that argument brings solace, well, even to use the tools that have had disposal to change, the routines of the look regulatory captured. And there's only one for example.

As Senator Whitehouse said in his opening remarks, regulatory failure prove out the year leading up to the financial crisis in 2008 and (inaudible) its impact. The willful blindness of regulators to recognize the risk that was building up in the banking industry was (inaudible) and yet many of those same regulators receive greater power in the aftermath.

The regulatory capture is real and it is furnished and I applaud the response for an important program to try to address it thank you.

JUDGE RAKOFF: Thank you. My name is Jed

## Regulatory Capture Forum

1 Rakoff. It's my privilege to be a Federal District  
2 Judge for the last 20 years, but my comments today are  
3 offered strictly in my personal capacity, although, of  
4 course, they are colored by the cases that I've seen in  
5 my court in the Southern District of New York where  
6 cases involving the financial industry are often  
7 brought.

8  
9 I second Professor Garrett's comments about  
10 the shortcomings of deferred prosecutions and  
11 nonprosecution agreements and the like, that have been  
12 brought against corporate entities and financial  
13 institutions.

14 Every case is different. Too many cases  
15 against corporations appear chiefly to realize innocent  
16 employees and shareholders and appear to have achieved  
17 very little in the way of (inaudible) futures  
18 (inaudible).

19 But to use the more striking (inaudible) is  
20 that these prosecutions and the parallel regulatory  
21 proceedings have rarely been brought against the  
22 individuals who actually committed the crimes.

23 The individuals who actually committed the  
24 crimes should be brought to justice as a matter of  
25 simple morality. Moreover, in my experience, there's

## Regulatory Capture Forum

1  
2       mush more deterrence when you go after the individuals.

3               This failure to go after the individuals is  
4 in striking contrast to practices in prior decades.

5 For example, in the savings and loan crisis that  
6 culminated in the early years of the and loan crisis of  
7 the 1990s, no fewer than 800 executives were  
8 successfully criminally prosecuted for their fraud and  
9 for concealing the increasingly risky investments in  
10 which those institutions were (inaudible).

11               These prosecutions of individuals included  
12 many high-level executives, including Charles Keating  
13 Junior, who was, in the eyes of many, the originator of  
14 the fraud, by comparison, even though the Department of  
15 Justice and the Securities and Exchange Commission have  
16 in recent years successfully brought high-profile cases  
17 against financial institutions for the fraudulent  
18 practices that led to the financial crisis.

19               In none of these cases has any high-level  
20 executive been criminally prosecuted, and even in the  
21 civil simple regulatory cases only a very few  
22 executives have been proceeded against. As Professor  
23 Garrett just mentioned, Deputy Attorney Yates has  
24 commendably called for greater emphasis on individual  
25 prosecution, and we'll see the results.



## 1 Regulatory Capture Forum

2 Now, I'm in no position to say whether the  
3 prior failure is the result in part or in total of  
4 regulatory capture or not, but I would note that  
5 historically successful prosecutions in the financial  
6 arena had been the product of joint investigations by  
7 Department of Justice and the relevant regulatory  
8 agency, whether it be the SEC or the OTS or the OCC or  
9 whatever.

10 You may recall that in connection with the  
11 S&L crisis, Senator Cranston of California was formally  
12 reprimanded for trying to derail the joint DOJ and  
13 regulatory investigation of Mr. Keating.

14 Nothing like that has been alleged in the  
15 financial crisis, but the failure to prosecute  
16 high-level individuals in connection with the financial  
17 crisis still stands (inaudible) in sharp contrast, to  
18 prior scandals where such prosecutions were common and  
19 successful.

20 It's really hard to escape the inference  
21 that the great recession which caused and continues to  
22 cause so much suffering was in part the result of  
23 fraudulent misconduct where in increasing risk was  
24 increasingly disguised creating a bubble.

25 One cannot help but ask, why have the

## 1 Regulatory Capture Forum

2 individuals who inflated that bubble not been brought  
3 to justice. Thank you.

4 UNIDENTIFIED SPEAKER: The questions  
5 discussed of the relationship between the prosecution  
6 of enterprise and individuals, and a lot of times  
7 academic writing has speculated on which is more  
8 effective.

9 And I know that you were just saying that  
10 there ought to be a shift and more prosecuting  
11 individuals and certainly the Ace Memo of last  
12 September lays that out; but I want to ask both  
13 Professor Garrett and Gretchen whether you thought that  
14 this was something you needed to see more of, and to  
15 the extent we haven't seen it, is explained by capture  
16 of some sort or by other considerations without the  
17 extent of your (inaudible).

18 UNIDENTIFIED SPEAKER: Well, I want to say  
19 two on things about that. I do think it's important  
20 that corporations be the target of criminal  
21 investigations. One of the things that you would  
22 especially be able to do is figure out who did what and  
23 to target responsible individuals.

24 When the organizations help the  
25 corporations that are cooperating, the corporations

## 1 Regulatory Capture Forum

2 (inaudible) to cooperate, the prosecutors and turnover  
3 documents, turn over e-mails that are privileged, and  
4 you think that that should be an enormous benefit.  
5 That should make it easier to sort out.

6 This is a complex organization and there  
7 are a lot of people involved in that illegal business  
8 scheme, and it's unfortunate that that power  
9 (inaudible) of cooperation hasn't been used effectively  
10 in the past; but the Yates memo changes from the  
11 Department of Justice.

12 It suggests that (inaudible) individuals  
13 must be prioritized individuals early on in the  
14 investigation, and the case of (inaudible) acts in the  
15 past years ago by a corporation that describe the  
16 conduct, the clock is ticking and the prosecutors  
17 decide, you know, we can't wait years worth to  
18 (inaudible) mandate who it was and to solve the case;  
19 but the experience of federal prosecutors when they  
20 have targeted individuals and other cases suggest that  
21 there's also serious resources concerned.

22 Many individuals are prosecuted, for  
23 example, who have been called for marketing illegal tax  
24 shelters, the prosecutors pretty readily (inaudible)  
25 for example, KPG and other corporations. The case

## Regulatory Capture Forum

1  
2 against individuals, and there are a couple of them,  
3 and many of them are (inaudible).

4 Now, we see those cases costing millions  
5 and millions of dollars in the prosecution, and we are  
6 beginning to have a couple of U.S. attorneys negotiate  
7 for prosecution agreements with the companies so that  
8 they have multiple employees, separately or represented  
9 by different law firms, counsel all of sudden to bring  
10 a case pending before it's complete.

11 Just a couple of months ago, we had a CEO  
12 prosecuted in a nasty coal mine explosion in West  
13 Virginia, and the prosecutors with the cooperation of  
14 supervisors who worked their way up the chain and that  
15 eventually decided to have evidence to prosecute the  
16 CEO. In contrast that we have other cases of  
17 prosecution agreements with other people (inaudible)  
18 where people died and individuals were wrongly  
19 convicted of (inaudible) and did those prosecutors  
20 think of it as resource question, even they (inaudible)  
21 or is it they stayed after a press conference,  
22 according to them they didn't see evidence of intent  
23 (inaudible) for people to really look into the case and  
24 weren't so quick to sign the agreement (inaudible)  
25 capture or inadequate resources or inadequate will,

## 1 Regulatory Capture Forum

2 (inaudible) all that matters is resources (inaudible).

3 MS. MORGENSON: I don't understand what a  
4 lawyer has to do to (inaudible) but all I know is that  
5 when I look at SEC settlements, (inaudible) settlements  
6 damaging an (inaudible) upsetting tab, I don't see  
7 anything from the individuals who perpetrated those  
8 acts, and I just can't help asking myself why.

9 The corporations didn't do the deed, some  
10 person or persons inside did, and shareholders end up  
11 paying, and so the consequence that (inaudible) deeply  
12 that Americans have to the regulatory system, but I  
13 don't really know what the answer is.

14 I do think we have to bear the impact of  
15 the revolving door where individuals leave their  
16 regulatory entities in the law firm and either  
17 represent or do not represent individuals or are  
18 pursued by that regulatory entity.

19 Obviously, people are entitled to be  
20 represented by the best that money can buy, but that  
21 seems to me is certainly part (inaudible) of the  
22 individual.

23 I think the SEC is reluctant to meet  
24 the challenge to go after individuals, and even when it  
25 does go after individuals, I think the actions taken

## Regulatory Capture Forum

1  
2 are passive in a way. The fact that the new century  
3 should be (inaudible) is that the (inaudible) very  
4 early on in the crisis, and there was actually  
5 accountability professionally, you know, at the time  
6 that the (inaudible) companies played out a monitor in  
7 the (inaudible) and bankruptcy on waited out chapter  
8 and versus hundreds of pages belonging to this report,  
9 gave the SEC a roadmap to how this group of executives  
10 had cooked the books and the fines and penalties that  
11 were extracted (inaudible) legal work. So in that case  
12 I looked at a large (inaudible) why the reluctance?  
13 Why not throw the book at them?

14 UNIDENTIFIED SPEAKER: One raises the  
15 question of the possibility of individuals and  
16 corporations, and you mentioned the change from the S&L  
17 crisis to the subprime crisis.

18 How many of them do you think is explained  
19 by the nature of regulation at issue? We have more  
20 complicated regulations where the actual informal  
21 regulations (inaudible) and predisposed prosecutors who  
22 want to go after individuals less and enterprises more  
23 or do you think that there's been a change in the  
24 nature of leverage with respect to particularly some of  
25 the larger players in terms of the potential public

## 1 Regulatory Capture Forum

2 impact and the resulting fines that you get as a result  
3 or did you have something else in mind.

4 JUDGE RAKOFF: I'm inclined to think it's  
5 something else. When I was a federal prosecutor I had  
6 the good fortune to be chief of the securities and  
7 business fraud unit in the U.S. Attorney's Office in  
8 the Southern District of New York, and we considered it  
9 a defeat if we could not find the individuals who had  
10 committed the crime, who actually had done the deeds,  
11 as opposed to going after companies. We almost never  
12 went after companies. Effectively we didn't think it  
13 was fair to the shareholders and employees of those  
14 entities that I mentioned in the S&L crisis, but the  
15 same was true of the accounting crisis that led to a  
16 WorldCom and Enron, where the very highest level CEOs  
17 of both companies were successfully prosecuted.  
18 There's a long history of successful prosecution of  
19 individuals.

20 These are not easy cases to prosecute, but  
21 it can be done. In the future there's high regulatory  
22 capture, whether that's the (inaudible). I think  
23 another element has been certain politics of that  
24 situation.

25 If you're a large institution and the

## 1 Regulatory Capture Forum

2 government's going after you and the regulator that you  
3 have to deal with is a going after you, you're going to  
4 have to come to terms with them on some terms.

5 You will attempt to get the best terms  
6 possible, and if there has been some degree of  
7 regulatory capture or revolving door or whatever, you  
8 may get terms that are not that onerous that you can  
9 view as just the cost of doing business, but ultimately  
10 you're going to have to come to terms.

11 So these are easy pickings for the  
12 government in a certain way. They can say we have  
13 today reached an agreement with fat cats and they're  
14 going to pay a great big fine and they're going to  
15 engage in compliance measures and sometimes they're  
16 going to have the monitor, and it sounds real good.

17 It's much harder to make the cases against  
18 the individuals, but you can and it historically has  
19 been done. Professor Garrett made an excellent point a  
20 minute ago where he pointed out that there has been  
21 much less use of the banking institutions themselves to  
22 cooperate against the individuals within their own  
23 community that actually committed the crimes. It's not  
24 going to be easy for any bank to give up their CEO, but  
25 the pressure that would be brought by the government in



## 1 Regulatory Capture Forum

2 that regard is considerable and hasn't really been made  
3 been made much use of.

4 Instead what has happened is that both the  
5 regulators and the Department of Justice have announced  
6 the settlement with the banking institution and they  
7 have just off to another case because they've gotten  
8 their big headline and they don't feel the need to  
9 pursue it further.

10 I also worry -- and a number of  
11 commentators have pointed this out -- that the less you  
12 pursue cases against individuals, the less able you are  
13 able to pursue cases against individuals. The  
14 prosecutors who pursue these cases successfully have to  
15 be quite specialized. It can't be your everyday line  
16 assistant U.S. attorney. It's people who over the  
17 years have developed expertise, and if you don't have  
18 that kind of investigation, that expertise is lost.

19 So I don't think it's so much a lack of  
20 resources. I think it's more of a lack of will,  
21 coupled with a lack of experience in pursuing the cases  
22 against the individuals.

23 Now, that is to say, because it is  
24 political in part, I think political pressure can and  
25 has had some effect. I applaud the Deputy Attorney

## 1 Regulatory Capture Forum

2 General Yates for her announcement of individuals, but  
3 I think it was also a reaction to public sentiment, and  
4 in that sense it was politics in the best sense.

5 MR. CASS: Let me ask Professor Garrett.  
6 One of your colleagues, after serving at the Federal  
7 Communications Division said that he thought the form  
8 of capture that people talked least about but what was  
9 the most pervasive form of capture was captured by the  
10 staff, captured by those who worked at an institution  
11 long-term.

12 To what extent do you think this exists in  
13 enforcement as well and what do you think the ultimate  
14 effect of that is?

15 PROFESSOR GARRETT: There's a revolving  
16 door and people leave after six or seven years of being  
17 federal prosecutors. I do think that federal  
18 prosecutors are extremely aggressive, that these are  
19 often elite units that are bringing major cooperate  
20 cases.

21 There have been a genuine change in focus,  
22 and you sort of defer nonprosecution agreements spreads  
23 like wildfire, all of a sudden the biggest cases, the  
24 cases involving the public companies just sort of the  
25 defacto things that we do.

## 1 Regulatory Capture Forum

2 I suspect that many of the U.S. attorneys  
3 working on these cases is this our job to be  
4 negotiating these sort of deals. We're not civil  
5 lawyers. I thought -- we're prosecutors. I think  
6 there was really was a change in the law. Many of them  
7 may have been resisted it.

8 I hope that things are turning now in  
9 another direction. (inaudible) the New York Times  
10 headlines when some of the first banks had to sign  
11 deferred prosecution agreements and not nonprosecution  
12 agreements filed entirely out of court.

13 And in the last couple of years we've seen  
14 plea agreements with banks and more and more is that we  
15 are going to more carefully investigate the individuals  
16 and we will be targeting bankers.

17 So I hope that the job of a federal  
18 prosecutor turns to more like what Judge Rakoff  
19 described it being in the past. So was it capture or  
20 was it just a change in focus, was it an overreaction  
21 and Arthur Andersen and sort of a policy approach that  
22 we need to go soft. I don't know.

23 I do want to say one thing which is for all  
24 of the things we are doing on particularly federal  
25 prosecutors today, when you compare the enforcement

## Regulatory Capture Forum

1  
2 against corporations on the criminal side in our  
3 country to criminal enforcement against corporations in  
4 just about any other country, there really isn't any  
5 comparison.

6           When you talk to people in the UK or France  
7 or other countries they say, well, you may complain  
8 that these prosecution agreements in the U.S. are too  
9 compromised, well, at least we're charging  
10 corporations. Many countries criminal liability to  
11 corporations doesn't exist or it's limited to certain  
12 areas, and there are billion dollar cases being  
13 brought. There are cases where employees are being  
14 charged. In many other countries often with major  
15 cooperate crimes happen. Like (inaudible) sanctions  
16 when banks in the UK and other countries are  
17 (inaudible) prosecutions that get brought they get  
18 brought in the U.S.

19           We shouldn't -- we've become sort of the  
20 vocal corporate (inaudible) in this country and maybe  
21 that's a good thing. Other countries aren't stepping  
22 up to the plate, but (inaudible) however there may be  
23 concerns about capture as to our criminal enforcement.  
24 It's a lot worse in other parts of the world.

25           UNIDENTIFIED SPEAKER: He just mentioned

## 1 Regulatory Capture Forum

2 the case. This is a case where ultimately prosecution  
3 failed, but it did put a company out of the business  
4 and there was a lot of debate about the prosecution  
5 whether it was well- or ill-conceived. Do you thing  
6 that has an impact?

7 MS. MORGENSON: Definitely. Whenever I ask  
8 prosecutors about those people are willing to talk to  
9 me are not for prosecution (inaudible) they say that  
10 that just put the fear of God in people. The idea of  
11 being responsible for putting 5,000 people out of work  
12 was just -- is just a really damaging hanging over  
13 deliver heads.

14 To Brandon and Judge Rakoff's point about  
15 problems with not bringing these cases because we're  
16 not using our muscle and we're going to lose the muscle  
17 memory as the prosecutors.

18 I was struck when I would read some of  
19 these settlement cases that the Department of Justice  
20 was bringing with these major banks on mortgage issues  
21 with the statement of facts, and the facts were really  
22 nothing more than I had uncovered years earlier in my  
23 reporting.

24 So here I am diving into these things and  
25 I'm finally going to get to some info that I wasn't

## Regulatory Capture Forum

1  
2 able to get when I was working so hard covering this  
3 five years ago, and there's nothing new in these  
4 statements of fact, nothing regulatory, in addition, of  
5 course, not identifying the perpetrators.

6 So I am seemingly unimpressed with what has  
7 been turned up as evidence to create and come to the  
8 table in these big settlements. It's really as if they  
9 were basically reading the newspapers.

10 JUDGE CASS: They may have been.

11 UNIDENTIFIED SPEAKER: We have time for one  
12 or two questions from the audience before we wrap the  
13 panel up.

14 ATTENDEE: This is a broader question.

15 MR. CASS: We have a mic.

16 ATTENDEE: Food safety, but it's a larger  
17 question about mens rea the state of mind of corporate  
18 officers.

19 (Inaudible) it has to do with the recent  
20 hospital mens rea case, and the case I'm thinking of  
21 has been a topic of this conversation because perhaps  
22 makes a prosecutor's job easier (inaudible) mens rea  
23 rules were better to incorporate more responsible or  
24 more at risk of being irresponsibility because with the  
25 agency they have to bring their (inaudible) DOJ, and

## Regulatory Capture Forum

1 the DOJ makes the determination (inaudible).

2 So perhaps that's a take the (inaudible).

3 MR. CASS: Let me ask if someone on the  
4 panel wants to take this. This is sort of one side of  
5 the question that's been raised recently. There have  
6 been people arguing that there's a need to increase the  
7 ways for requirements rather than decrease, and so we  
8 receive both sides.  
9

10 So who wants to take the first crack.

11 JUDGE RAKOFF: Yes. I think that with the  
12 watered down mens rea, what we're talking about in  
13 terms of the criminal law individuals, the sanction  
14 we're talking about is prison. I think it is frankly  
15 immoral to send anyone to prison unless they have  
16 knowingly done something wrong.

17 Now, there are rare exceptions. We have,  
18 for example, in some states negligent homicides, but  
19 even there it's usually a form of recklessness that  
20 borders on knowingly, and I understand, particularly in  
21 the environmental area, there's a push to hold people  
22 responsible for environmental degradations that are  
23 quite severe and I understand the motivation there, but  
24 I think if we're talking about prison, I don't see how  
25 one could ever justify prison for someone who didn't

## Regulatory Capture Forum

1  
2 knowingly do something wrong.

3 MR. CASS: I would say there's some areas  
4 where you have responsible (inaudible) and strictly  
5 form of liabilities. It's limited to misdemeanors, and  
6 in some areas actually you do have to show some  
7 enhanced mental state of the executive even for a  
8 misdemeanor, like in the Blankenship trial in West  
9 Virginia. There's a safety violations (inaudible)  
10 require more than negligence on behalf of the  
11 executive.

12 I think it raises different questions,  
13 whether it's really a good idea at all to do something  
14 that the Senate is looking at mens rea legislation  
15 (inaudible) across the board for federal crimes, but I  
16 guess the idea being that it's a technical violation,  
17 maybe the executives couldn't be expected to know that  
18 something was really a crime. It might actually  
19 backfire if it's a regulated industry where every  
20 executive should know that minors are supposed to have  
21 ventilation (inaudible) and supposed to do testing to  
22 make sure who doesn't have salmonella.

23 I'm not sure how effective that (inaudible)  
24 goal is as it just insulates executives from liability,  
25 but do I think it's an important conversation to have.



## 1 Regulatory Capture Forum

2 I certainly agree with Judge Rakoff. It's a felony, it  
3 must be mens rea and the prosecutors would want to risk  
4 bringing a case if they couldn't have shown mens rea.

5 JUDGE CASS: We have time for one last  
6 question.

7 ATTENDEE: I wanted to ask Gretchen about  
8 the whole notion of waivers and whether when they are  
9 given by the SEC they are public documents and when  
10 they are written about, what is the -- how does the SEC  
11 justify them.

12 MS. MORGENSON: Good questions. The waivers  
13 are public, but it's extremely difficult to find them.  
14 You have to really look hard. The SEC doesn't make it  
15 easy on their website to determine when waivers are  
16 given they sort of put them all together so you can't  
17 see how often.

18 This is why this report was cited by my  
19 colleague years ago was informative and revealing, that  
20 could be changed I think as part of the idea of  
21 transparently about deals and what goes on in the  
22 making of them.

23 What was your other question?

24 ATTENDEE: Just how does the SEC --

25 MS. MORGENSON: They justify them as

## Regulatory Capture Forum

1  
2 they're too punitive. If you were not to give JP  
3 Morgan the waiver on, for instance, the ability to have  
4 quick access to the capital markets to raise money in  
5 the bond or stock offerings.

6 If you were to take that ability away as  
7 too punitive (inaudible) our markets. These are  
8 typically the excuses that are given. You know, the  
9 money management waiver is especially troubling because  
10 why would you think that the SEC would want a bank that  
11 has made a fraudulent activity to be able to still  
12 manage public investor's money, and yet it's deemed as  
13 something that would hurt the markets or hurt the bank.

14 I think part of this whole discussion, we  
15 have -- capture involves have the idea that the  
16 regulatory regulators job, especially at the Federal  
17 Reserve, is safety and soundness of the banking system,  
18 and for many years they thought profitability meant  
19 safety and soundness, and whether they were making  
20 profits, you know, fairly or not, didn't really enter  
21 into the discussion. So I think that's he also a big  
22 piece of it as well.

23 MR. CROLEY: We're going to have to let the  
24 mics be captured by the next panel, but please join me  
25 in thanking this panel.

## Regulatory Capture Forum

1  
2 UNIDENTIFIED SPEAKER: I think we'll give a  
3 everybody two-minute break.

4 (There was a brief recess taken.)

5 UNIDENTIFIED SPEAKER: I'll ask each of our  
6 panelists to offer brief remarks. The topic is to ask  
7 some questions and then we'll open the floor. And  
8 before I call on him, first I would like to pose a few  
9 questions or I'll ask the panelists to return. I'll  
10 kind of get the juices following a little bit since  
11 this panel is about rule making. There's really two  
12 origins of every question.

13 One is the general form of capture,  
14 something I know these panelists thought a lot about  
15 but I think also a concept that requires continued  
16 precision.

17 So question number one is: What is  
18 capture, and more specifically, how are we  
19 distinguishing it from influence or even benign  
20 interaction with communications with our government.  
21 So the investigation ability of that company is what's  
22 captured in rule making, but, as I say, the term  
23 warrants some precision in general.

24 Second question is going to be: What's the  
25 counter factor, what's the baseline against which we

## 1 Regulatory Capture Forum

2 are assessing the presence or absence of capture. To  
3 flip that question, to put it a different way, what  
4 does a uncaptured regulatory regime look like and  
5 what's uncaptured in such regime.

6 The third thing I think might be fun for  
7 some of us to touch on concerns medicine. So there are  
8 antidotes or metaphor or capture, what is the side  
9 effects? Where are the costs associated with solutions  
10 to capture and how can we assess the relative benefits  
11 and disadvantages of administering these metaphors.

12 And finally thinking (inaudible) the same  
13 sort of thing, questions our (inaudible) capture is  
14 come to some common understanding of what that is as  
15 opposed to the preventative way. I don't want to take  
16 this metaphor too far already because is it  
17 preventative or is it some kind of therapy?

18 And return to the first question. I'm  
19 going to turn it over to Dan. A lot of people  
20 institutions a lot of legal rules, one could argue, are  
21 designed precisely to address capture. It's just so  
22 happens we don't use that term.

23 So regarding judicial review you might  
24 think of sunshine laws or FOIA laws. We have offices  
25 and programs in government that are designed, one could

## 1 Regulatory Capture Forum

2 argue, to address capture, although again we don't use  
3 that term.

4 The IGs, the GAOs, and the Department of  
5 Justice are institutions that are captured, that are  
6 capture-finding institutions. So let me frame our  
7 conversation with those four themes, and I'll invite  
8 panelists to term them as they see it. (inaudible).

9 MR. CARPENTER: Thank you very much. It's  
10 an honor to be here. I'll answer some of those  
11 questions now and some later. Harvard Business School  
12 Professor David Moss and I looked at capture in a 2013  
13 book, here it is, Preventing Regulatory Capture, and to  
14 paraphrase, we find capture as the result or process by  
15 which regulation is consistently directed away from the  
16 public interest and towards the interest of the  
17 industry. There are other special interests that we  
18 also talk about. So it's not always industry-base  
19 capture, but that's at the focus here today.

20 The public interest is also hard to define,  
21 but for today's purposes I want to focus on where the  
22 public interest is represented in statutes passed by  
23 Congress and signed by the President, upheld by the  
24 courts, and the statutory regime, that is, and where  
25 capture happens where special interest draw policy away

## 1 Regulatory Capture Forum

2 from statutory intent for industry (inaudible).

3 Four brief points. By the way, that last  
4 point fits rather well with Senator Lee's concern about  
5 the way in which Congressional intent (inaudible)  
6 regulatory capture.

7 So capture is the (inaudible) we can argue  
8 in this book can be weak or strong. Capture is not, in  
9 other words, like pregnancy (inaudible). It's not a  
10 binary situation where it just consists or does not.

11 There are lots of cases of intermediate  
12 capture you agree with policies push in (inaudible) in  
13 a friendly direction is smaller compared, for instance,  
14 to the very plausible cases of capture at the OCC  
15 before the financial crisis. The case of medical  
16 device regulation at the FDA maybe the case of weak  
17 capture, and we can talk that, and for that reason  
18 number two the degree to which there is a continuum  
19 means that capture is at least in part preventable,  
20 which is, we shouldn't congratulate our political  
21 institutions entirely if we agree that not all agencies  
22 have been fully captured then we ought to be looking at  
23 that variation.

24 If that's true, if we see some evidence of  
25 capture in an agency, then full scale dismantling or

## Regulatory Capture Forum

1  
2 overhaul of the regime or full scale deregulation of  
3 the capture alone is where (inaudible) and those may be  
4 good policy to pursue for other reasons, but pursuing  
5 them for capture alone, I think, misses the fact there  
6 are often (inaudible).

7 Third, and these are really the two major  
8 points I have to offer today. Capture is really hard  
9 to measure. It's not because it's a sticky thing.  
10 Capture is hard to measure in part -- this is where I  
11 completely agree with Senator Whitehouse -- because we  
12 as a society have failed to produce (inaudible) the red  
13 flags, the warning signs.

14 We have institutions that are  
15 systematically set up to assess the adherence of  
16 administrative decision for legislative intent, and to  
17 assess the quantifiable costs and benefits of  
18 regulation.

19 Yet as Senator Whitehouse noted in his  
20 preface today in his introduction, we don't have  
21 anything like that for capture agency. It's far from  
22 clear to me, by the way, to the extent that you appoint  
23 a guardian or camazar to kind of capture analysis, or  
24 set of camazars in that respect, the courts are in a  
25 good position to do this or at least are in a good

## Regulatory Capture Forum

1 position to do this alone.

2 I also think that statisticians and  
3 economists, or social scientists like myself, if their  
4 training is primarily in cost benefit analysis without  
5 being attune to legislative intent, meaning politics,  
6 for that matter, especially quantitative and  
7 statistical test analysis, are also poorly equipped to  
8 measure it unless they're trained (inaudible) program  
9 evaluation alone.  
10

11 Now, senator Whitehouse's proposal to have  
12 inspectors general to look at the issue is a good  
13 start, but I do worry that inspectors general are  
14 usually already busy with other things.

15 Executive order or some degree of  
16 Congressional intention for the issue would help. When  
17 agencies have their decisions reviewed according to  
18 certain criteria, such as rationale feasibility,  
19 fairness of administrative procedure or cost benefit  
20 calculus, you tend to respond and then to care about  
21 those things.

22 We systematically scrutinize agency  
23 decisions. For capture we might get agencies to think  
24 about those things generally. Since we're on a panel  
25 study rule making I would highly recommend the work of



## 1 Regulatory Capture Forum

2 the Susan Yaki of the University of Wisconsin Madison  
3 who is doing really the best quantitative work on rule  
4 making.

5 Her ideas to use data (inaudible)  
6 techniques -- this goes back over ten years -- comments  
7 to rules that relate to exchanges between a proposed  
8 and final stage. It's not airtight proof. There are a  
9 lot of different reasons the correlation between  
10 sometimes comments and (inaudible) reasons other than  
11 capture shouldn't miss that or see her work as she  
12 thinks about this very generally; but she's done it,  
13 and it largely has not been done for financial  
14 agencies.

15 Where it has been done, by the way, and in  
16 a recent study by CFTC, it was found that (inaudible)  
17 future trader commission rules were four to ten times  
18 more responsive to regulated financial firms comments  
19 than it was to financial professionals and other  
20 commentators. Four to ten times.

21 Is that proof positive alone of capture?  
22 We don't know, but if that would persist over a long  
23 time you'd certainly want to investigate further. She  
24 is a collaborator on a grant funded project that we  
25 currently have right now at Harvard at detecting

## 1 Regulatory Capture Forum

2 industry influencing and financially rule making and we  
3 hope to be reporting some results in 12 to 18 months.

4 Finally at the risk of making myself  
5 unwelcome back in Cambridge -- by the way, for Steve  
6 Croley's question, what would uncaptured rule making  
7 look like? It's hard to get a perfect example of what  
8 it would look like, but the absence, or at least the  
9 diminution of those kinds of persistent industry-based  
10 advantages would probably be one test.

11 If you're finding consistently greater  
12 attention to industry comments across the range of  
13 agencies, at least we ought to be asking why and where  
14 those are -- where those differentials are smaller.

15 I'm not saying we ought to be automatically  
16 more pleased, but we probably don't need to work as  
17 hard for capture.

18 Finally at the risk of making myself  
19 unwelcomed back at Cambridge, let me conclude that  
20 agencies reliance on university expertise is without  
21 caution of ever less of a fix for capture. In part  
22 that's because corporate partnerships, which are fine  
23 in and of themselves, make universities ever less  
24 independent in judging policy.

25 The example I think that is probably

## Regulatory Capture Forum

1  
2 clearest to me is the area of medical technology.  
3 There's a plausible revolving door right now between  
4 the industry funded Clinical Research Institute in the  
5 FDA. The new commissioner of the FDA comes from that  
6 institute. And Duke, by the way, just hired as kind of  
7 head of the policy center, the commissioner who set up  
8 a major program funded by industry at Duke.

9 Consider the 21st century Cures Act  
10 recently supported by the University of Pennsylvania  
11 president Amy Guttman. She's entitled to her opinion.  
12 I knew her as an academic at Princeton, but it was a  
13 poorly written piece.

14 I highly doubt that Amy Guttman political  
15 philosopher or democratic education would have written  
16 it, but Amy Guttman, the president of the university  
17 which stands to benefit greatly from a billion dollar  
18 increase in NIH funding and which stands to benefit  
19 greatly from the more rapid commercialization of ideas  
20 developed at Penn, is more likely to have written it.

21 Of course, if you see the documentary  
22 inside job you may think there's a reason to believe  
23 that my own university's economics department played an  
24 outside role in thinking the appointments and the  
25 decision-making that went into the financial crisis.

## 1 Regulatory Capture Forum

2 One chapter in the (inaudible) I highly  
3 recommend it, produces evidence that economists  
4 themselves show some systematic evidence of capture.  
5 Their conclusions and studies of executive  
6 compensation -- their conclusions and studies of  
7 executive compensation, for instance, depending upon  
8 their funding and their proximity to executive  
9 education sources. These are really big statistically  
10 significant differences.

11 I don't want to suggest any one profession  
12 or professional school should be singled out. I know  
13 many political scientists are, for that matter,  
14 including some of my colleagues, conflicts of  
15 interests, but these biases should be examined across  
16 the board.

17 To sum up. Capture can be weak or strong.  
18 It's preventable and not necessarily a death trap for  
19 agencies. We should look at the variation. We need to  
20 measure it systematically. That is the one thing I  
21 think we need institutional action on, and we need to  
22 be carefully about trusting universities as sources of  
23 expertise. Sometimes they're as much the problem as  
24 the solution. Thanks.

25 UNIDENTIFIED SPEAKER: I would like to try

## 1 Regulatory Capture Forum

2 to do two things in my brief time up here. First say  
3 something about the definition of capture, and then go  
4 to some process and other solutions which I would like  
5 to briefly suggest to you.

6 Capture is easy to diagnose in the case of  
7 MMS where we have lots of industry influence and  
8 objectively a failure to regulate (inaudible) from  
9 blowing up, but there's a more subtle kind, which Dan  
10 spoke about, which is the persistent tilting of policy  
11 away from the public interest. The difficulty, of  
12 course, is defining the public interest, because if  
13 you're talking about whether regulatory policy should  
14 be more stringent or less stringent, that's a  
15 contestable matter, and people obviously have points of  
16 view about that and put in different kinds of evidence.

17 Nevertheless, I do think capture occurs  
18 when you see a regulatory agency persistently adopting  
19 the policies favored by regulated entities. And I say  
20 that because most of the statutes, particularly in the  
21 health safety and environmental area, are aspirational,  
22 where Congress is asking the agency, in effect, to do  
23 the best it can, the most affordable thing we can, to  
24 protect the environment. And when agencies  
25 persistently fail to do that, I think that raises, at

## Regulatory Capture Forum

1  
2 least, and inference of Capture.

3           Now, the possibly exists both in a neutral  
4 definition, such as that offered by Professor Carpenter  
5 or in the remarks of Senator Lee, that capture can go  
6 both ways. But I think the empirical evidence, in  
7 fact, leads us mostly to conclude that it goes in the  
8 direction of regulated entities. The reason for that  
9 is simple. Most forms of capture, subtle and more  
10 overt, depend on the resources. As the vice president  
11 of the Center for Progressive Reform, I would love to  
12 have the resources of a capturing agency. We can't  
13 seem to raise that kind of money. I'm sure that's true  
14 of all my colleagues in the room in the public interest  
15 community.

16           Well, what to do? First, I would study the  
17 impact of decreases in funding. Funding of regulatory  
18 agencies is as well as (inaudible) in decades. The  
19 high point was in the 1970s. That is, have lots of  
20 (inaudible) effects of deteriorating regulatory policy,  
21 and I think, and I can talk more about this in remarks,  
22 has made agencies much more subjective, much more  
23 capable of being captured by regulated entities.

24           In that regard (inaudible) and I propose  
25 that we three agencies (inaudible). I think we ought

## 1 Regulatory Capture Forum

2 to ask agencies what amount of resources do they  
3 reasonably need to carry out their (inaudible) more  
4 effectively. And by the way, I would put decrease  
5 funding in the definition of "capture." The amount of  
6 money we save by underfunding regulatory agencies is  
7 minute in a federal budget and wouldn't make one bit of  
8 difference to the federal deficit. We could double or  
9 triple funding of every agency tomorrow, and no one  
10 would notice the difference in the overall federal  
11 budget.

12 On the grounds of transparency suggested by  
13 Senator Whitehouse, I would start by better  
14 calendaring. Agency officials, higher officials keep  
15 up with calendars, and you can't learn much from them,  
16 and it's somewhat inconsistent. I think there should  
17 be more detail about what happens into those meetings,  
18 maybe a brief summary, so you can trace meetings, who's  
19 meeting and what is occurring in those meetings.

20 I would require regulatory agencies to do  
21 summary statistics of who comes to meetings, and how  
22 often they meet so at the end of the year, you could go  
23 to one source of data, find out how many meetings they  
24 hold, and who they held them with. The agencies  
25 themselves would do the statistics. I would do the

## Regulatory Capture Forum

1  
2 same for rule-making comments. I realize there are  
3 thousands of them, but they can be coded when they come  
4 in, because they're not all electronic, and sorted; and  
5 you can find out that industry-related entities have  
6 many comments, and public interest groups have far  
7 fewer.

8 To the extent those studies have been done,  
9 they're very difficult to do and very time consuming.  
10 Industry meetings and comments exceed those filed by  
11 public interest groups five or ten to one, almost  
12 without exception. They're (inaudible) rule-makings in  
13 which there are no public interest comments.

14 Finally -- and I'll end with this -- Rina  
15 (phonetic) and I have suggested what we call regulatory  
16 metrics, going on Professor Carpenter's suggestion. We  
17 would do a sort of a meta statistics. So, for example,  
18 and to oversimplify, we would have the EPA report on  
19 how clean the water is. And if we're stuck with  
20 62 percent clean water for a decade as -- and I think  
21 we are, by the way, then I think we could start to ask  
22 questions, why are we stuck there? It may not be  
23 captured. It may be lack of funding. It could be lots  
24 of things. But we ought to be able in a more  
25 straightforward and visible fashion to chart the



## 1 Regulatory Capture Forum

2 progress of agencies towards the statutory (inaudible),  
3 which are to protect the public and the environment.

4 MS. RAO: Thanks to the administrative  
5 conference for inviting me to speak on these important  
6 issues. I was asked to say a little bit about the role  
7 of Congress in regulatory fashion, which I'll do in my  
8 brief time up here.

9 So I guess I wanted to start by saying I  
10 think one part, at least one part, of the traditional  
11 story of capture is correct, which is that it's much  
12 easier to regulate than to legislate. As you can see,  
13 the dynamic begins in Congress, which often delegates  
14 significant amounts of authority to administrative  
15 agencies, and that authority is often given to various  
16 open-ended (inaudible) terms. And in these agencies,  
17 there are often a very significant zone of discretion,  
18 and the accumulation of these delegations, I think  
19 particularly over time, has shifted most major  
20 policy-making decisions to agencies, and away from the  
21 legislative process. And in the regulatory process,  
22 there is much less visibility, and there's much less  
23 accountability.

24 I know that lawmakers delegate for a  
25 variety of reasons. Sometimes they can't reach a

## Regulatory Capture Forum

1  
2 compromise. They may simply want to rely on the  
3 expertise of agencies, or they may just want to push  
4 off certain hard questions. But I think another  
5 important reason that we see so many delegations of  
6 authorities is that members are often able to get more  
7 work done working with agencies than by passing  
8 legislation. And I think this tendency has only become  
9 more pronounced in an area of party polarization and  
10 gridlock in Congress.

11 So how do we accomplish our objectives. I  
12 think there are both formal and informal mechanisms for  
13 that. The informal mechanisms are all the things that  
14 we see publicly, like there are things like oversight  
15 hearings. There are, you know, open letters to  
16 agencies asking for information. There is the  
17 appropriations process. You know, all of these things  
18 are legitimate ways in which Congress interacts with  
19 the administrative state.

20 But first, there are lots of informal  
21 mechanisms, and that includes all of the various  
22 informal types of contacts between members of Congress  
23 and their staff and agency staff.

24 Now, (inaudible), this type of influence is  
25 very difficult to measure. I think that Professor

## Regulatory Capture Forum

1  
2 Shapiro's idea that we should be documenting the  
3 (inaudible) agency should probably also apply to people  
4 on the Hill. And, you know, I think we might get a  
5 better sense, then, of what the magnitude of this  
6 influence is. But I think anyone -- and I've worked  
7 both in the executive branch and in Congress, and I  
8 think this is -- most people understand that this is  
9 the an ordinary way that things get done.

10           And so I think it's -- the shift is -- the  
11 (inaudible) focus on this administration made them  
12 surprising, because it really is where -- where  
13 policy-making is done. In some ways it's problematic  
14 because members of Congress don't have any executive  
15 power, and they don't have any administrative power.  
16 They're exclusively given legislative power. And I  
17 think that Steve raises a great point that, you know,  
18 what -- what is the (inaudible) for entity. And I  
19 think it's partly because the baseline is so difficult  
20 to know, right, what is the public interest, that the  
21 process becomes so much more important, right. Our  
22 constitution creates a process. (Inaudible) defining  
23 what the public interest is, and that is our law-making  
24 process. Now, whatever happens with the (inaudible)  
25 administrative agencies.

## 1 Regulatory Capture Forum

2 Now, Congress, of course, has the power to  
3 oversee agencies and to ensure that they are compliant  
4 with the mandates of the law, which presumably reflects  
5 the public industry. But it's often the case that  
6 statutes are so open-ended that it's very hard to  
7 figure out whether the agency is meeting the  
8 requirements of the law. It's no easy task to do that.  
9 And so fatefulness to law, in many instances, may well  
10 become fatefulness to the interest of a particular  
11 member of Congress.

12 I think it's this -- I think really the  
13 problem is that there's so much discretion in agencies.  
14 And so that allows the private interest groups and  
15 members of Congress to try to influence that  
16 discretion.

17 You can call that "capture." I'm not sure  
18 that the label necessarily matters, but the problem is  
19 that there's an influence that may be pressing against  
20 the public interest as defined by our public laws.

21 And I want to also say that I think this  
22 dynamic, the dynamic that law makers focus on  
23 administration rather than law-making has really  
24 undermined Congress as an institution. I mean, the  
25 Constitution already has stacked the deck against the

## Regulatory Capture Forum

1  
2 (inaudible). It's really hard to do. You have to go  
3 through (inaudible) feature, not a bug of our  
4 constitutional system. But if (inaudible) members can  
5 accomplish a lot of their goals by working through the  
6 administrative state this (inaudible) Congress as an  
7 institution because it reduces the incentive to  
8 actually pass laws.

9           So what we see happening in these instances  
10 is that lawmakers are (inaudible) the most significant  
11 power, really the first power of our federal  
12 government, the legislative power, that they exercise  
13 together, for little bits of the administration that  
14 they can exercise separately.

15           And I think ultimately this (inaudible) in  
16 Congress, and we have also seen that it allows the  
17 executive branch to accumulate ever more power, which  
18 further upsets the separation of powers. And, of  
19 course, those separation of powers were designed to  
20 secure liberty and accountability.

21           And that's what under my file. Thanks.

22           MR. CALABRIA: Well, first of all, let me  
23 say I'm honored to be invited by such a great panel,  
24 and it's nice to come back to work here (inaudible) to  
25 the banking committee which is not (inaudible).

## 1 Regulatory Capture Forum

2 The one thing I learned early enough is  
3 (inaudible) let me say as an economist it's nice to say  
4 it's nice to be invited with lawyers. My dissertation  
5 work, about 20 years ago, was on the topic of  
6 (inaudible) and it's something I've given a lot of  
7 thought to. That you have academics in the room. I  
8 (inaudible) let me also say.

9 (CAN'T HEAR A WORD HE'S SAYING)

10 The video is online if you'd like to learn  
11 more about it, then you should by the book and read it.

12 All that said, let me -- first make a point  
13 in my mind that there is, in my view, a number of  
14 regulatory systems that are, if not a hundred percent,  
15 maybe 90, 95 percent pure (inaudible) is not to pick on  
16 anyone at the federal level (inaudible) I think about  
17 licensing of lawyers and hair dressers. It's pure  
18 capture.

19 You know, I think the public benefits from  
20 those sorts of things are pretty close to nil. And so  
21 those are the easy cases, and the answer is don't do  
22 it.

23 But let's turn to the hard cases. I just  
24 wanted to make that point, because there are some  
25 pretty easy cases, and we should basically consider

## Regulatory Capture Forum

1  
2 that all regulations have the distribution of cost and  
3 benefits, and that capture increases the cost and  
4 potentially reduces the benefits. But that means, in  
5 some instances, that otherwise capture on the expense  
6 of trying to reduce capture and make some regulations;  
7 otherwise, the benefits concede cost to not be the  
8 case.

9 And unfortunately of those cases, the  
10 (inaudible) gets to spend the rest of my time on the  
11 more difficult case of very clear public benefits.  
12 Some potential for capture. And, of course, we don't  
13 all just want to have the benefits exceed cost relative  
14 to cost. So let me talk about a couple of ways that I  
15 think we can try to structurally reduce some of the  
16 cost of capture in a way that hopefully reduces gravely  
17 the benefits.

18 So let me first say that maybe because I'm  
19 an economist, I like simplicity. So me, in my  
20 experience -- and I also spent a little bit of time  
21 running a regulatory bureau. Complexity is a friend of  
22 the industry. The (inaudible) regulation is the easier  
23 it is for industry to influence the outcome. I'll  
24 mention some experience. In my role at the finance,  
25 over time, as big capital regulation has become more

## Regulatory Capture Forum

1  
2 (inaudible) the industry itself. It's one reason, for  
3 instance, that the (inaudible) I favor things like  
4 (inaudible). It's not because they don't have costs.  
5 They're easier to monitor. They're easy for the public  
6 to figure out what's going on, and it's a lot harder to  
7 gain. So, again, simplicity really is a very big  
8 issue.

9 Let me also say that I spent a number of  
10 years on the banking committee working on regulatory  
11 structures, and one of the painful things that should  
12 have been obvious is, don't have an agency highly  
13 dependent on a small number of entities. So the office  
14 of (inaudible) about 25 percent of its budget is  
15 derived from WaMu.

16 If you think that's bad, (inaudible)  
17 regulator only recipe for capture. So one of the  
18 suggestions is certainly we try to do this. And in  
19 2008, where we created a new regulator (inaudible).  
20 And, again, I would say that is a regulatory agency.  
21 The number of timeframe agency that is now 60. That is  
22 still pretty damn small for a regulator and easier to  
23 capture in that way. So I do emphasize, the broader  
24 the base of funding, the broader the base of repping  
25 attendees, it's much less likely that anyone is likely



## 1 Regulatory Capture Forum

2 to capture an institution.

3 I do want to say without going into too  
4 much detail, I think it's important to keep in mind  
5 that we often talk about the industry. There is no  
6 "the industry". There's members of the industry?

7 My experience is both a Hill staffer  
8 regulators, that's the majority of time. It's one  
9 (inaudible) It's one sector of the industry segment to  
10 another sector of the industry, and it's important to  
11 keep in mind that having this balance between different  
12 sectors of the industry is actually a to kind of reduce  
13 capture.

14 When one part of the industry is small  
15 things (inaudible) that's a balance of the process that  
16 I think is very helpful. Here's what I'm suggesting  
17 where I can get myself into trouble.

18 The regulatory and legislative process  
19 should become less dependent on lawyers. Let me kind  
20 of tell you why. I have repeatedly seen in my  
21 experience when the regulatory process has been tilted  
22 in favor of industry quite frankly because the lawyers  
23 didn't understand the economics.

24 I'll be the first to say that economists  
25 don't understand law. I'm not demanding that we have

## Regulatory Capture Forum

1  
2 economists run the process, because but I think that  
3 would turn out really badly. What I am demanding and  
4 suggesting is that we have more multidisciplinary  
5 approach where economists at the table and economics  
6 (inaudible) only lawyers were involved, but oddly  
7 enough, a financial regulation really is predominantly  
8 lawyers.

9           You know my opinion the failure, for  
10 instance, of cost benefit analysis many of the time has  
11 been the economists have not been involved. Why do I  
12 say this is important? Partly, my background as an  
13 economist is (inaudible) market structure down.

14           I think about (inaudible) do they  
15 regulatory interventions impact concentration, impact  
16 competition, and, again, I think you have to look a how  
17 that affects it because often I have seen industry come  
18 in and suggest something that sounds quite reasonable,  
19 (inaudible) but it tilts the playing field?

20           So I really do think that you have to have  
21 an economist at the process. I will say there's a  
22 wonderful book out about 20 years ago called The  
23 President and the Counsel of Economic Advisors. It's a  
24 series (inaudible) of interviews of economic advisors.  
25 You really couldn't tell the partisanship if you didn't

## 1 Regulatory Capture Forum

2 know it because the constant (inaudible) the chairs of  
3 the economic (inaudible) complain about all the  
4 agencies essentially (inaudible) by their clients.

5 In fact, the CEA constantly pushing back  
6 against agent decisions that they thought benefited one  
7 industry over another, and I would say I think in the  
8 regulator process in the Executive Branch (inaudible)  
9 would be the Counsel of Economic Advisors having to do  
10 a greater role is important.

11 OMB tries to play this role, and I think  
12 they've largely been okay at it, but, again,  
13 (inaudible) and the theme I would say is more checks  
14 and balances to try to bring some light.

15 I think it's also important that one of the  
16 chapters talks about cognitive capture, and I think  
17 this is a really important unit to keep in mind. We  
18 all walk around in the baggage of biases (inaudible)  
19 situation and none of us is purely objective. The way  
20 that we all try to be purely objective is we sit around  
21 the room and deliberate and we try to question each  
22 other's priors. We don't see enough of that in my  
23 opinion in the regulatory process where there's a  
24 challenge. And I do think that having more of that --  
25 again, to me the best way to do that is to make sure

## 1 Regulatory Capture Forum

2 you have a process and make sure your viewpoints are  
3 heard and make sure it's challenge to that.

4 Let me just say, I do have some faith in  
5 the process and example would be really makes a lot of  
6 sense is you go back and you look at the dates and the  
7 range of the Administrative Procedures Act and it was  
8 claimed when this act was put in place (inaudible) I  
9 think it's fair to say government is a lot bigger today  
10 than it was in 1946 even accounting for World War II.

11 The Administration Procedures Act was a  
12 reaction to process of thirties and forties where there  
13 were often cartel creations by the regulators, where  
14 the big-industry players came in behind the scenes.

15 And so that notice-and-comment process, to  
16 me, has been almost a complete value in terms of  
17 bringing some light in the process. Has it been  
18 enough? No. But I do think that having this process  
19 and bringing more scrutiny is very important.

20 So, again, I'm saying, part of my concern  
21 is I often here the claim of evenly (inaudible) always  
22 ends up benefiting the industry. I'd rather take twice  
23 as long to do something right than half the time to do  
24 it wrong. Again I worry that the speed of conversation  
25 (inaudible). Then we have a few things that we can

## 1 Regulatory Capture Forum

2 talk about.

3 MR. CROLEY: Keith, thanks. Please join me  
4 in thanking our panelists for their remarks. There are  
5 several topics that we're going to have to (inaudible)  
6 let's postpone that for some Q and A, but let me  
7 introduce our next speaker Senator Elizabeth Warren.

8 UNIDENTIFIED SPEAKER: It's a great  
9 pleasure to introduce for Senator Warren, but actually  
10 Professor Warren, and I think we should also, the many  
11 academics in the room, respect the fact a few academics  
12 got to create their own federal agency with what could  
13 be called the problem of capture, which I think you  
14 would say, and we haven't talked yet about structure of  
15 the agencies, but to CFPB similar financial section of  
16 the bureau is indeed structured so as to solve a  
17 problem maybe other agencies (inaudible).

18 It's a great pleasure to have you here,  
19 Senator.

20 SENATOR WARREN: Thank you. Nice to see  
21 you-all. So thank you for having me here. I  
22 appreciate the introduction. I appreciate the  
23 invitation to be here today. I actually wish I could  
24 have been with you throughout this conference. I got  
25 to catch the tail end of your remarks.

## Regulatory Capture Forum

1  
2 We had two other hearings going on this  
3 morning, so I couldn't do it, but I wish I could have  
4 been with you because I (inaudible) the regulatory  
5 capture is a very big deal. It is one more way in  
6 which powerful corporations (inaudible) the system to  
7 work for themselves, and the rest of America pays the  
8 price.

9 One aspect of this problem is that law  
10 enforcement treats powerful corporations with kid  
11 gloves. I recently put out a report called "Rigged  
12 Justice," that list 20 examples from just 2015 alone of  
13 weekly enforcement against big corporations and their  
14 senior executives. We essentially have a two-tier  
15 legal system now. One for giant corporations and one  
16 for everyone else, and the message is clear: For the  
17 wealthy and the powerful, following the law is merely  
18 optional.

19 In a country that has etched equal justice  
20 under law above the doors to the United States Supreme  
21 Court, this is an ugly truth. But today I want to  
22 focus on another aspect of regulatory capture. The  
23 capture of agencies as they like the rules, because  
24 here, too, the game in Washington tilts sharply in  
25 favor of big companies.

## 1 Regulatory Capture Forum

2 So let's start with the obvious. It is  
3 really, really hard to pass a law through Congress that  
4 benefits working families. We have plenty of lobbyists  
5 in Washington, but they don't want laboring on behalf  
6 of working families. The tilt in Congress is pretty  
7 much out there for everyone to see. Lots of concern  
8 about preserving (inaudible) tax breaks for big  
9 companies, but not much help for seniors who are trying  
10 to scrape by on social security. Lots of concern for  
11 (inaudible) who want looser regulations and oversight,  
12 but not much help for people paying a high interest  
13 rate on student loans. It is disgraceful, but at least  
14 it's visible. Corporate influence works even better in  
15 the shadows, and that's where the rule-making occurs.  
16 That corporate influence rule-making process becomes a  
17 place where strong, clear laws goes to die.

18 Considering the plight of financial reform,  
19 following the worst financial crisis in three  
20 generations, one that resulted in taxpayers spending  
21 hundreds of billions of dollars to bail out banks.  
22 Congress passed the Dodd-Frank Act to make sure that  
23 this type of crisis never happened again.

24 Main Street went toe to toe with Wall  
25 Street, and we lost some battles, but we also won some

## Regulatory Capture Forum

1  
2 major victories. But passing the law wasn't the end;  
3 it was just the beginning.

4 To implement the law, Dodd-Frank required  
5 several regulators to write literally hundreds of  
6 different rules. The big banks and their friends knew  
7 that each one of those rules presented a golden  
8 opportunity undermine, pervert, or simply undue the  
9 work of Congress. One lobbyist referred to the day  
10 that Dodd Frank was passed as halftime, and the big  
11 banks have been lobbying agencies aggressively ever  
12 since.

13 Wall Street understands what the public too  
14 often forgets. The public battle is in Congress, but  
15 even if the industry loses, there are more chances to  
16 weaken or overturn the law in the agencies and in the  
17 courts. Giant corporations and their lobbyists devote  
18 their influence agency rule-making, and I have to say  
19 it pays off handsomely.

20 My message for today is pretty simple.  
21 When it comes to undue industry influence, our  
22 rule-making process is broken from start to finish. At  
23 every stage, from months before a rule is proposed to  
24 the final decision of a court hearing to challenge that  
25 rule, the existing process is loaded with opportunities



## Regulatory Capture Forum

1  
2 for powerful industry groups to tilt the scales in  
3 their favor. The tilt starts early.

4 For example, a 2011 study of EPA records  
5 from 1994 to 2009 found that industry groups held a  
6 virtual monopoly of informal communications with the  
7 EPA that occurred before proposed rules on hazardous  
8 air pollutants were made publicly available. On  
9 average, industry groups engage in 170 times more  
10 informal communications with the EPA than public  
11 interest groups. Communications that occurred before  
12 any proposed rules were ever written. Similarly,  
13 Dodd-Frank has a provision called the Volcker Rule, and  
14 the idea was to stop banks from engaging in certain  
15 kinds of risky behavior.

16 Before that rule could be written, groups  
17 engaged, who had Wall Street interests, met with  
18 federal regulators 419 times, accounting for over  
19 93 percent of meetings between the federal regulators  
20 and external parties about the Volcker Rule. Think  
21 about that.

22 Less than 7 percent of the meetings were  
23 with individuals and groups representing the public  
24 interest.

25 As rules wind their way through process,

## Regulatory Capture Forum

1  
2 prolonging just intensifies. (Inaudible) formal  
3 opportunity to weigh in, their views are quickly buried  
4 in an avalanche of detailed, well-funded,  
5 well-credentialed comment where industry insiders and  
6 their highly paid allies.

7           You know, those EPA rules that I just  
8 mentioned on dangerous air pollutants, industry groups  
9 submitted 81 percent of the comments during the notice  
10 and comments, period. Public interest groups submitted  
11 less than 4 percent of the comments. Some observers  
12 argue that this resource mismatch has a smaller impact  
13 with agencies than it does with Congress.

14           Unlike Congressional action, agency rules  
15 are constrained by well-established judicial review  
16 standards that seek to determine whether the agency's  
17 action is supported by the evidentiary record and the  
18 authority delegated to it by Congress. The rules must  
19 be supported by "substantial evidence," and agency  
20 actions must not be arbitrary and capricious.

21           But corporate players are savvy. They get  
22 it. They have learned that those same judicial review  
23 standards can be used to suffocate new rules.  
24 Companies don't simply photocopy the same comments and  
25 jam up an agency's inbox with identical assertions.

## 1 Regulatory Capture Forum

2 They play a much more sophisticated game leveraging their  
3 own expertise and paying outside experts with  
4 purportedly independent credentials to produce long and  
5 detailed comments filled with data and analyses, all  
6 selectively produced to serve their own interest.

7 This push buried the agency in detailed  
8 self-serving comments, slows the process massively.  
9 And their overall dominance of the notes-and-comment  
10 process results in rules that are longer, more  
11 complicated, and more the liking of major players in  
12 the industry.

13 Over the last few decades, additional  
14 barriers to rule-making have popped up. Requirements  
15 include cost-benefit analysis and evaluating the impact  
16 of the rule on small businesses and the environment.

17 Sometimes these processes result in better  
18 rules, but often they are just more obstacles that  
19 result in even longer, more complex rules, and even  
20 more opportunities for (inaudible) industry players to  
21 slow things down and build exceptions for themselves.

22 Consider the Office of Information and  
23 Regulatory Affairs, or as we all know it around here,  
24 OIRA. This is the tiny, obscure, and incredibly  
25 powerful agency that reviews significant regulatory

## 1 Regulatory Capture Forum

2 proposals developed in other parts of government before  
3 they can become law.

4 A study of interest groups meeting with  
5 OIRA showed that between October 1st, 2001, to  
6 June 1st, 2011, OIRA met with five times as many  
7 representatives of industry as with people representing  
8 public interest groups.

9 And just last year, two professors at the  
10 University of Wisconsin, Madison, released a report  
11 showing a strong correlation between interest groups  
12 lobbying OIRA and changes in OIRA rules that then  
13 helped those industry groups.

14 These procedures tie agencies in  
15 bureaucratic knots and bleed much-needed resources.  
16 Often, agencies have to give up entirely on writing new  
17 rules. It's possible to see this happening in  
18 instances where Congress or the Court has directed an  
19 agency to issue a specific rule by a specific time.

20 A recent study with such deadlines, between  
21 1996 and 2014, show that over 50 percent of final rules  
22 were not finished on or before their mandated  
23 deadlines. That's right. More than half the time,  
24 federal agencies did not meet their legally mandated  
25 deadlines.

## 1 Regulatory Capture Forum

2 So there's an example. Dodd-Frank was  
3 passed almost six years ago, but as of today, agencies  
4 still haven't finalized nearly one-quarter of the  
5 required rules. By the way, these delays can actually  
6 put lives at risk.

7 Five years ago, Congress passed the FDA  
8 Food Safety Modernization Act to revamp food safety  
9 laws. Anyone in here who eats food should care about  
10 this law.

11 Now, those regulations were due in 2012,  
12 many weren't published until 2015, and then only after  
13 a court ordered the FDA to publish the regulations.

14 Meanwhile, every year, 3,000 Americans were  
15 dying from a food-borne illnesses, and 48 million  
16 Americans, that's one in six, was getting sick from  
17 contaminated food.

18 In 2008, a dam at the Tennessee Valley  
19 Authority Power Plant broke, dumping  
20 1.1 billion gallons of coal ash sludge into a nearby  
21 community, damaging over 100 homes and contaminating a  
22 river and several streams. Within a year, the EPA sent  
23 OIRA a proposed rule regulating disposal of hazardous  
24 coal ash waste, but a vigorous lobbying campaign by the  
25 coal industry froze the proposal, and it took five more

## Regulatory Capture Forum

1  
2 years for a rule to emerge from OIRA. Even if an  
3 agency manages to jump through all of the hoops and  
4 withstands all of the pressure and actually issues a  
5 final rule, companies sue.

6 In theory, the threat of a lawsuit of a  
7 corporate lawsuit over a rule that's too strong should  
8 be counterbalanced by the threat of a public interest  
9 lawsuit over a rule that's too weak or a rule that  
10 never gets issued at all. But, here again, the rules  
11 governing judicial review favor those who would stop  
12 the agency from acting in the public interest.

13 Under the law, it is easier for business  
14 groups to challenge a rule for being too strong or for  
15 being too restrictive or riddled with loopholes. And  
16 it's nearly impossible to successfully challenge an  
17 agency for not acting at all.

18 And, boy, does this take a toll over time.  
19 I talk with agency heads who are like beaten dogs.  
20 They just want to keep their heads down. This is even  
21 more true for agency attorneys general. It is hard to  
22 go up against a well-financed machine who will use  
23 every tool at its disposal to destroy years of work.

24 And it is a lot easier just to give in and  
25 write a softer rule or to write no rule at all.

## 1 Regulatory Capture Forum

2 Over time, the lobbyists' work gets done by  
3 the agency's own lawyers who are so risk averse, that  
4 they kill off agency action before it ever gets off the  
5 ground.

6 Now, to be clear, engaging in informal  
7 dialogue, participating in notice-and-comment, and  
8 going to court when agencies step out of line are not  
9 bad things. But over time, bludgeoning agencies into  
10 submission undercuts the public interest. The goal  
11 should be to have a system where influence over new  
12 rules is measured not by the size of the bankroll, but  
13 by the strength of the argument.

14 And here are a few principals that would  
15 help balance the scales. First, increase transparency.  
16 The more sunlight that shines on the agency's process  
17 and on industry efforts to influence them, the more  
18 likely it is that an agency's final product will  
19 reflect the public interest.

20 A good start will be to disclose all of the  
21 meetings between agencies and interested parties, but  
22 before and during the rule-making process. Another  
23 would be to help agency support distinguish between  
24 legitimate high-quality data and research, on one hand,  
25 and bought-and-paid-for studies, on the other, that

## 1 Regulatory Capture Forum

2 would require disclosure of financial arrangements and  
3 editorial relationships associated with regulatory  
4 comments. And anyone who wants to cite their own data  
5 should have to publish the data set online. Sure,  
6 (inaudible) amenity, for example, but get the data out  
7 there where other people can test drive it.

8 Second, level the playing field between  
9 public and private interests. The net fact of the  
10 notice-and-comment process that's dominated by business  
11 advocates is that severely under-resource public  
12 interest advocates are just simply outdone.

13 States who experiment with systems to build  
14 a public advocate (inaudible) regulatory process or  
15 compensate public interest advocates who invest  
16 resources to produce meaningful feedback on the rules.  
17 In summary, judicial review of agencies needs to be  
18 reformed to give the public a fighting chance, to  
19 challenge these rules, (inaudible) and agency capture.

20 And third, boy, do I agree with you on this  
21 one: Simplify. Complex rules take longer to finalize  
22 and are harder for the public to understand, and  
23 inevitably contain more special interest (inaudible)  
24 that favor business interest of small business and  
25 individuals.



## Regulatory Capture Forum

1  
2           Complex rules are also more aligned on  
3 industry that provide additional detail and expertise.  
4 And that means more opportunities for capture. Simple  
5 works better.

6           And forth, limit the opportunities for  
7 cultural capture. Regulators should be beholden to the  
8 American people, not to corporate benefactors. Two  
9 ideas: Crack down on the revolving door, and  
10 (inaudible) parachutes for executives who enter  
11 government.

12           In 2013, the project of (inaudible)  
13 released a report showing that major corporations  
14 routinely offered their executives financial incentives  
15 to the tunes of hundreds of thousands, even at millions  
16 of dollars, for accepting (inaudible) positions. The  
17 Financial Services Conflict of Interest Act, a bill  
18 introduced by Senator Baldwin and by Congressman  
19 Cummings, would make these payments illegal by removing  
20 government employees from decisions, and they would  
21 help target conflicts of interest by removing  
22 government employees from decisions that financially  
23 benefit their former employers. Now, that is at least  
24 a good start in this area.

25           And finally, give the agencies the money

## 1 Regulatory Capture Forum

2 they need to do their jobs. Writing rules, responding  
3 to thousands of comments, separating valuable data from  
4 self-serving nonsense takes capable people who have  
5 adequate resources. Starving the regulators is the  
6 quickest way possible to ensure that this work is  
7 essentially outsourced to the regulated industries  
8 themselves. Those are some ideas for how it is that we  
9 could begin to shift the system.

10 But I want to make one more point about  
11 regulatory reform before we leave. I think the idea of  
12 regulatory reform has become politically very popular,  
13 but too many of the proposals that go under the title  
14 of "Regulatory Reform" are actually supported by the  
15 industry, precisely because those proposals would  
16 create even more opportunities for them to block  
17 regulations they don't like. Regulatory reform is  
18 badly needed, but the reforms must address the central  
19 problem, a tilted playing field that benefits the rich  
20 and the powerful. This won't be easy. These folks  
21 won't willingly give up power and influence, but this  
22 is about building our government that works not just  
23 for those at the top, but that works for all of us.  
24 And that's why I'm glad you are here today.

25 I appreciate your holding this conference.

## 1 Regulatory Capture Forum

2 We have to make some changes. Thank you. Thank you  
3 very much.

4 MR. CROLEY: Well, those remarks make a  
5 perfect segue to go open the floor for a couple of  
6 questions. I'm sensitive to folks' time, and I ran  
7 over both. We can take a couple of questions.

8 UNIDENTIFIED SPEAKER: The administrative  
9 conference originated and has long-championed  
10 techniques for rule making, such as negotiating rule  
11 making. Some agencies, particularly the EPA, as an  
12 example, (inaudible) a variety of collaborative  
13 techniques. My question is: Do you see this kind of  
14 activity more as opening a new forum for regulatory  
15 capture, or is it more in the other direction, that it  
16 contends we're producing an openness and a balance?

17 MR. CALABRIA: Having been involved from  
18 the regulatory side, at least one issue in rule making,  
19 (inaudible) safe from the regulator side, was a painful  
20 process. I could see why agencies don't actually want  
21 to do it.

22 In the one instance that (inaudible)  
23 involved, Congress was very specific about the range of  
24 interest that would be represented. So it was very  
25 clear that X number seats would go to consumer interest

## Regulatory Capture Forum

1  
2 and X number of seats would go to industry interest.  
3 And I found the process to be generally pretty helpful,  
4 because there was a very wide range of interest at the  
5 table. And so I do think it would be helpful, but I  
6 have to say (inaudible) negotiating rule making  
7 nominated.

8 And, again, I want to emphasize, Congress  
9 has the ability to require (inaudible) in rule making  
10 every single member of the negotiating committee if  
11 they wanted. So, again, it starts at where Congress  
12 puts the (inaudible) oversight in. So it could be bad  
13 or it could be good. It really depends on how it's  
14 done at the beginning.

15 UNIDENTIFIED SPEAKER: I would like to  
16 address -- my fellow economists have said that -- my  
17 fellow economists said that the lawyers are now in the  
18 process. I think that's something we have to live  
19 with, the regulatory structures around laws and regs,  
20 and that's what lawyers write.

21 I think the thing that the economists have  
22 to learn is they've got to learn the law. And most  
23 economists come to Washington, and they spend all of  
24 their time reading a newspaper and the American  
25 Economic Review, and I think they ought to start

## 1 Regulatory Capture Forum

2 spending more time reading the Administrative Law  
3 Review.

4 MR. CALABRIA: I couldn't agree more, as an  
5 economist who likes to read statutes and regulations.  
6 My point was really to have that, you know, at the  
7 table. And I remember (inaudible) I was involved in  
8 where certainly on a number of occasions, economists  
9 suggested things that simply weren't within the law.  
10 And you didn't work there to correct them on it, but,  
11 again, I wouldn't suggest that we would ever let  
12 economists rule the world or rule the regulatory  
13 process. I just think that if we're at the table with  
14 the lawyers on the front end, I think it would be the  
15 most favorable decision.

16 I'll also emphasize as well -- again,  
17 sounds partly self-serving -- the fact that I was doing  
18 (inaudible) on the entire staff of the committee during  
19 my time there, and this is a (inaudible) committee that  
20 oversees the Federal Reserve, that oversees the bank  
21 regulators. I think congressmen do a lot better job.  
22 We might need an equivalent of the joint economic  
23 committee (inaudible), but they're looking at the  
24 economy. I think adding the process in where  
25 committees are much more engaged in having that side of

## Regulatory Capture Forum

1  
2 (inaudible). Again, I'm not trying to insult the  
3 lawyers in the room. They bring in expertise at the  
4 table, but I think that's your only role (inaudible)  
5 and are making bad decisions.

6 UNIDENTIFIED SPEAKER: That was my -- the  
7 point I want to make is that if economists want to get  
8 in the game, then they got to pay the price. And the  
9 price is learning administrative law, and if they don't  
10 do it, they're not going to get in the game. And the  
11 fact is -- the other point I want to make is, if you  
12 see the difference between two disciplines of the day  
13 on what is captured, it's a mess.

14 What do the lawyers say? The lawyers say  
15 it's how many comments you write, how many meetings  
16 (inaudible). Well, what does an economist say? The  
17 economists say, we have to look at (inaudible). And  
18 that's a completely -- two different approaches to a  
19 big conference, and that's why I think the only way the  
20 economists are going to get in the game, they have got  
21 to pay the price. (Inaudible).

22 MR. SHAPIRO: Just really quick, and this  
23 is an important point. I'm actually sympathetic to  
24 Mark's point of how the influence of lawyers -- I would  
25 just say, you know, there's more than two species on

## 1 Regulatory Capture Forum

2 the planet. There's more than lawyers and economists.  
3 There's a variety of other social scientists that I  
4 think should also be in the game.

5 Actually, since the Obama administration's  
6 credit -- not just the Obama administration -- a lot of  
7 policy has become more (inaudible) were better informed  
8 in recent years, and I think that's a huge improvement.

9 They can also, I think, do a much better  
10 job incorporating people studying political  
11 institution, social networks, and things like that. I  
12 think it also raises the worry -- and I'll just point  
13 you to (inaudible) Gonzales, an economist at University  
14 of Chicago, a Chicago-school economist, who writes in  
15 our book about how -- the fact that there's pretty good  
16 evidence (inaudible) that congressmen themselves maybe  
17 captured.

18 It's not to say that lawyers aren't also  
19 subject to capture, but I think, you know, bringing in  
20 these different views is a good idea, but making very  
21 sure that at least we are aware of different biases and  
22 different sponsorships or subsidies that they receive  
23 from regulated interests or from nonregulated special  
24 interests.

25 If I might, I'd like to say a word about

## Regulatory Capture Forum

1  
2 expertise as well, because I actually think it's yet  
3 another protection against capture. But one of the  
4 consequences of the defunding of agencies is we  
5 gradually thinned out the expertise, mainly because  
6 people with experience in the agencies are retiring and  
7 we're not replacing them at all or replacing them with  
8 people with much less experience. And the reason I  
9 said that, I just wrote an article, published an  
10 article about expertise, and I define "expertise" both  
11 as professional training and experience.

12 And the best agency practices, you have a  
13 (inaudible) of people from different disciplines who  
14 engage in the very robust process within the agency.  
15 And picking up on Jim's point, after a while, the more  
16 experienced economists do learn the law, or science,  
17 and they're able to comment on it. And the lawyers in  
18 the agency then become more familiar with the economics  
19 and the science of the agency, and they can comment on  
20 it. So it's just not that you're looking to one  
21 profession to bring that kind of input into the  
22 experience; you have the opportunity to create an  
23 atmosphere, an environment, where all of your  
24 professionals learn enough about each other's class  
25 that they can debate what their hearing from the



## 1 Regulatory Capture Forum

2 outside, and throwing their own independent judgment to  
3 it. And that really is, and/or could be, an effective  
4 deterrent of capturing, I think.

5 MR. CARPENTER: And just a quick other  
6 point, Sid's point about agency defunding, and this was  
7 made by other people as well. I think the experience  
8 of term limits (inaudible) in legislative is an  
9 instructive one here. If you go into any legislative  
10 capital and ask people what happened after the -- on  
11 the states that passed term limits and their  
12 quantitative studies to back up this point, the effect  
13 was not to return representations of the people. The  
14 effect was to increase the power of state bureaucrats  
15 in those capitals, because even the new, fresh,  
16 unexperienced legislators turn to for advice the  
17 government agencies or, in some cases, interest groups.  
18 The quantitative study that backs this up is a really  
19 great study of where is power to the American  
20 legislative (inaudible).

21 It turns out there are legislative  
22 professionals, and which is to say the amount of  
23 resources given to committees is lower. Right.  
24 Reliance on (inaudible) model legislation is higher,  
25 which you might agree with his claims, but keep in mind

## Regulatory Capture Forum

1  
2 that that's an (inaudible) is our federal system  
3 designed by the founders of (inaudible) of a democracy.  
4 To the extent that these states are all adopting the  
5 same kinds of legislation, written by the same single  
6 interest group, it's undermining federalist diversity.

7 And, again, I think that points to not  
8 just, you know, a case against agency defunding, but a  
9 case (inaudible) legislative investments.

10 UNIDENTIFIED SPEAKER: We'll take two more  
11 questions, and I'm sure the panel will be happy to hang  
12 about if people have follow-ups.

13 ATTENDEE: Hi. I'm Kevin (inaudible). The  
14 conversation about regulatory capture and expertise is  
15 fascinating, because I think there is a relationship.  
16 Those in the industries that are regulated, those were  
17 (inaudible) regulations tend to be the most expert in  
18 the subject matter, so there's a natural tendency  
19 towards imbalance. We have a congressional budget  
20 office. We have a government accountability office.  
21 Shouldn't we have a congressional regulatory office,  
22 someplace that supplies expertise, from the right  
23 source? Not just attorneys, not just economists;  
24 subject matter experts who could help Congress oversee  
25 our regulatory system, a double-check cost benefit

## Regulatory Capture Forum

1  
2 analysis (inaudible).

3 MR. CALABRIA: It's certainly worth  
4 recognizing the GNA, and CRS will do some of that as  
5 well. I don't want some self-serving economist to say  
6 I've worked on this, because that's not always the  
7 answer; but I do think that there could be more -- I've  
8 certainly done this as a staffer. There are lots of  
9 resources people who we weren't aware of, but you can  
10 always use more as a staffer.

11 Congress used to have the Office of  
12 Technology Assessment; and despite the name,  
13 "Technology" has actually performed that broader  
14 regulatory role for Congress.

15 MS. RAO: I would just say I think it's  
16 helpful so long as it's being used for legislative  
17 purposes and not to try to interfere with the executive  
18 power, because once those agencies are operating,  
19 they're part of the executive branch, not Congress.

20 UNIDENTIFIED SPEAKER: I thank you-all for  
21 being here. I was wondering what you thought of the  
22 strategy of insulating regulators from the industries  
23 that they regulate, mainly through ethics safeguards  
24 and, of course, by the Office of Independence.

25 MR. CALABRIA: So let me give you a kind of

## 1 Regulatory Capture Forum

2 mixed view. I'm very sympathetic to having restraints  
3 on revolving doors. I certainly am very sympathetic,  
4 and to me it says a lot that large training  
5 institutions will give you a very large bonus if you  
6 leave a financial institution to work for government.  
7 Even if there's not corruption, that certainly is the  
8 appearance of it, if nothing else, but I think there is  
9 contention.

10 I don't think you want people at agencies  
11 who have never worked in the industry, because, you  
12 know, the real problem here is (inaudible) the really  
13 important thing to keep in mind is, there's no  
14 requirements for anything to ever be (inaudible) is the  
15 regulation. Congress can make those decisions. They  
16 can make some of them.

17 So I would argue, and I can say I've had  
18 lots of arguments with people as a staffer when I  
19 suggested that maybe we, as congressmen, should be a  
20 legislator, rather than tell you.

21 And I think there are way too many  
22 instances where Congress just kicks the can down the  
23 road. It's ridiculous (Inaudible) rule making under  
24 Dodd-Frank. (Inaudible) I can write on two pages.

25 That said, you know, it's a real tension,

## 1 Regulatory Capture Forum

2 because when you have this complexity, the people who  
3 know are in the industry, and so you have to have this  
4 bylaw. And, again, I think the more the dialogue is in  
5 the sunlight, all the better; but I certainly think  
6 reasonable restrictions on when you go to work for the  
7 industry.

8 There certainly should be restrictions on,  
9 you know, if you're a bank examiner, it's one thing to  
10 say, you've got two years where you can't work for a  
11 bank. It should probably be a little longer for you to  
12 actually work for the bank you might have examined. So  
13 there should be some distinguishing characteristics  
14 there, but I certainly think that that's something we  
15 should work at. But I do agree that we build morale.

16 The objective shouldn't be, how do we make  
17 sure that an agency never hears from anyone in the  
18 industry. And the objective should be more sources of  
19 information.

20 MR. CROLEY: Okay. We're 20 minutes over  
21 our time. Please help me to thank our guests.

22 (Forum concluded at 12:20 p.m.)  
23  
24  
25

Regulatory Capture Forum

CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Steven Poulakos, registered Professional Reporter, the officer before whom the foregoing proceedings were taken, do hereby certify that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day of March, 2016.

---

Steven Poulakos, RPR

NOTARY PUBLIC IN AND FOR  
THE DISTRICT OF

My Commission Expires:  
May 31, 2016