

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 Not Reviewed for Transcription Errors
14 BRANDON GARRETT

15 HON. RONALD CASS

16 HON. JED RAKOFF

17 DANIEL CARPENTER

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19 STEVEN CROLEY

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25 Job No: 104401

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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

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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

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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

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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

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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. **Not Reviewed for Transcription Errors**

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,

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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

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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 **Not Reviewed for Transcription Errors** 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

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1 control.

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

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

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

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

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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)

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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

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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
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14 folks were being taken on shooting trips and having
15 drug and hooker parties and being flown to the Peach
16 Bowl on private aircraft, and examining rigs owned by
17 companies with which they had an employment application
18 pending before the whole damn thing blew up; but it was
19 really nobody's job to look for that, and if you are
20 the agency, then it's embarrassing to point that stuff
21 out, it's bad for (inaudible). You can be isolated and
22 squeeze that agency, and so it's got to be somebody
23 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

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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

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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?

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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

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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)

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

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

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

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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. **Not Reviewed for Transcription Errors**
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.

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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. **Not Reviewed for Transcription Errors**

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

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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. **Not Reviewed for Transcription Errors**

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

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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

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1 principles.

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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.

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

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

When these powers are combined in a single

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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

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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

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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.

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

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

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

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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.

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

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

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1 cases they're right.

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

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

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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

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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 **Not Reviewed for Transcription Errors**
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

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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.

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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 **Not Reviewed for Transcription Errors**
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

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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

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

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

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.

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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

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1 year over the last decade.

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

5
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

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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

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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

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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

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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

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

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

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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.

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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

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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

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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

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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,

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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

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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

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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

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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

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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

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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.

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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 **Not Reviewed for Transcription Errors**
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

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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. **Not Reviewed for Transcription Errors** 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

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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

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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

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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

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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.

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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

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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.

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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.

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

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

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

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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

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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

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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

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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

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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

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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

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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

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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.

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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

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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

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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

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

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

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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

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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

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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. **Not Reviewed for Transcription Errors** 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

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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.

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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
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14 problem is that there's so much discretion in agencies.
15 And so that allows the private interest groups and
16 members of Congress to try to influence that
17 discretion.

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

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

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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).

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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

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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

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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

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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. **Not Reviewed for Transcription Errors**

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

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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

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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

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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

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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.

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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.

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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

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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.

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

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

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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,

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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.

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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.

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

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

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

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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.

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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

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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.

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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.

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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

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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 **Not Reviewed for Transcription Errors**
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.

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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

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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.

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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

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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

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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

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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

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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

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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

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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

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

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

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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

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1
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,

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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

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Steven Poulakos, RPR

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