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

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

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

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

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

I. An Intellectual History of Agency Capture

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

II. Cautionary Notes About Capture

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

III. Addressing Agency Capture

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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