

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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