

**"Justice Denied: Rules Delayed on Auto Safety and Mental Health."
Subcommittee on Oversight, Federal Rights, and Agency Action
November 7, 2013**

**Responses to Written Questions for the Record for Professor Thomas O. McGarity
From Senator Sheldon Whitehouse**

Regulated industries often seek to "capture" the regulatory agencies that enforce our laws in order to frustrate the laws' intended effects and protect their own private interests. Regulatory capture corrodes the American system of government, and, as we have seen in the cases of the Gulf oil spill, the global financial crisis, and the Sago mine tragedy, can lead to disaster.

According to anonymous senior administration officials, the Office of Information and Regulatory Affairs (OIRA) is highly responsive to political concerns, routinely conducts "off the clock" informal reviews of proposed rules, and demands that agencies ask permission before submitting rules for review.

• How does threat of capture arise in the context of OIRA review of proposed regulations?

For many years observers of federal regulation, ranging from Chicago School founder George Stigler to consumer activist Ralph Nader, have worried about the possibility that regulatory agencies over time become "captured" by the very entities that they are supposed to regulating.¹ In the less conspiratorial versions of the capture theory, agencies succumb to the sustained influence of one-sided information, blandishments and threats from the regulated entities that are ever-present in agency hallways, that meet with officials in the Office of Information and Regulatory Affairs, and that make their cases for their clients on Capitol Hill and in the media. An agency faced with limited resources and overwhelming responsibilities usually finds it very difficult to maintain a constantly vigilant posture with respect to all of the activities under its jurisdiction. The simple rule of bureaucratic life that "you can't go to the mat every time" limits the extent to which an agency can force a recalcitrant industry to conform to an ideal statutory conception of the public interest. The regulated industries know that, in the words of a former gun industry lobbyist, "[t]he closer relationship you have toward the regulator, the better off you are," and they are prepared to spend significant resources to obtain and maintain access to regulatory decisionmakers.² The interests of the beneficiaries of the regulatory programs, on the other hand, are diffuse because the impact of regulatory decision on the daily lives of individual beneficiaries are ordinarily imperceptible. Even when individual beneficiaries are sufficiently affected by a regulatory decision to take notice, they generally "lack preexisting organizations through which their concerns can easily be channeled." The result is an "asymmetry between public and industry attentiveness" on the part of federal agencies.³

¹ Charles McCarry, *Citizen Nader* 217 (1972); George Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 335 (1971). See also Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* 4-21 (1981).

² Laura Sullivan, *Success of Shift in Guns Policy Is Debatable*, *Baltimore Sun*, October 27, 2004, at A1 (lobbyist quote). See also Paul Quirk, *Industry Influence in Federal Regulatory Agencies* 13 (1981); Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 *U. Pa. L. Rev.* 1027, 1065-69 (1990); Howard Latin, *Ideal versus Real Regulatory Efficiency: Implementation Of Uniform Standards And 'Fine-Tuning' Regulatory Reforms*, 37 *Stan. L. Rev.* 1267, 1331 (1985); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1669, 1685-87 (1975).

³ Paul Quirk, *Industry Influence in Federal Regulatory Agencies* 13 (1981) (quotes); Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 *U. Pa. L. Rev.* 1027, 1067-69 (1990).

This asymmetry is particularly acute in the case of the Office of Information and Regulatory Affairs.⁴ A recent study undertaken by the Center for Progressive Reform of OIRA meetings with outside groups concerning pending regulatory initiatives between October 16, 2001 and June 1, 2011 found that OIRA staff had met with outside groups 1,080 times and those meetings involved 5,759 appearances by outside participants. Fully 65 percent of those participants represented regulated interests, and this was about five times the number of participants that represented public interest groups. 73 percent of the meetings were exclusively with industry groups, while only 7 percent were exclusively with public interest groups. 43 percent of the meetings took place before the agency's proposal was released to the public.⁵ Not surprisingly, studies have shown that the vast majority of changes that OIRA demands to agency rulemaking documents favor the regulated industries.⁶

• How would you recommend addressing the threat of regulatory capture in the context of the OIRA review process?

Perhaps the best way to ensure against regulatory capture in the context of OIRA is to increase the transparency of the OIRA review process. OIRA review is not governed by the Administrative Procedure Act, and the transparency of that review process has waxed and waned over the years.⁷ Strong congressional reaction to attempts by regulated interests to influence rulemaking outcomes through sympathetic officials in OIRA during the 1980s resulted in somewhat more transparency with respect to communications between outsiders and OIRA and between OIRA and the agencies while rules are pending. For example, the current executive order governing OIRA review of agency rulemaking provides that a "redlined" version of the draft proposed or final rule that the agency submitted to OIRA be made available to the public after the final version is published in the Federal Register, or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action.⁸ This redlined version is necessary for the public to be able to identify all of the changes that were made to the draft rule while it was undergoing review at OIRA. However, OIRA does not typically make such redlined drafts available on its website or in the online rulemaking docket, and it is sometimes quite difficult for interested citizens to pry those documents loose from OIRA. Although OIRA typically provides on its website notices of meetings that it has had with

⁴ Jonathan Lash, Katherine Gillman & David Sheridan, *A Season of Spoils* (1984), at 18-29; Susan J. Tolchin & Martin Tolchin, *Dismantling America* ch. 2 (1983); Teresa M. Schwartz, *Regulatory Standards and Products Liability: Striking the Right Balance Between the Two*, 30 Mich. J. L. Reform 431, t 447-48 (1997); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 Duke L. J. 1059, 1073 (2001) (concluding that industry has better access to OIRA and the White House than public interest groups); David C. Vladeck, *Defending Courts: A Brief Rejoinder to Professors Fried and Rosenberg*, 31 Seton Hall L. Rev. 631, 639 (2001).

⁵ Rena Steinzor, Michael Patoka & James Goodwin, *Behind Closed Doors at the White House* (Center for Progressive Reform, November, 2011), at 10.

⁶ See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 47, 72-73 (2006) (a survey of top political appointees at EPA under Bush I and Clinton, in which 89 percent of respondents agreed that OIRA never or rarely made changes that would enhance protection of human health or the environment, and often or always made regulations less burdensome for regulated entities); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. Colorado L. Rev. 335, 365 (2006) (examining 25 rules identified by the GAO as "significantly changed" by OIRA between June 2001 and July 2002, and concluding that for 24 of the 25 rules, OIRA's suggested changes "would weaken environmental, health, or safety protection").

⁷ Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1309-10 (2006).

⁸ Executive Order 12866 §6(b)(4)(D), 3 C.F.R. 638 (1993) (requiring OIRA to "make available all documents exchanged between OIRA and the agency during the review by OIRA").

interested parties concerning particular rules, the content of the conversations that took place in those meetings is not available to the public. Without knowing what went on during such meetings, it is impossible to know the extent to which OIRA has been captured by the regulated industries. Similarly, since the content of conversations between OIRA personnel and agency staff need not be memorialized, it is hard to know how much indirect industry pressure on agencies through OIRA is influencing the outcomes of agency rulemakings.

Congress should consider amending the Administrative Procedure Act (APA) to increase the transparency of interactions between private sector actors and OIRA and between OIRA and the agencies, such that this step of the rulemaking process is as transparent as every other step of the rulemaking process that the APA governs. (In drafting this provision, however, Congress should make it explicit that it is not endorsing the institution of centralized regulatory review within the White House.) Transparency enhances the legitimacy of the rulemaking process, ensures that the decisionmaking process is not contaminated by extraneous and irrelevant political considerations unrelated to the agency's statute, and generally enhances the quality of the policy decisions that underlie the resulting rules. Congress could require that the content of such communications be memorialized and placed in the public rulemaking record. Disclosure could go a long way toward holding the initiators and recipients of such contacts accountable for their behind-the-scenes attempts to influence the outcomes of high-stakes rulemakings. That in turn may make entities with an interest in the outcome of rulemaking more reluctant to initiate the contacts in the first place. And that should reduce the threat of industry capture of OIRA.