

TESTIMONY OF SIDNEY A. SHAPIRO

**UNIVERSITY DISTINGUISHED CHAIR IN LAW,
ASSOCIATE DEAN FOR RESEARCH AND DEVELOPMENT,
WAKE FOREST SCHOOL OF LAW
AND
MEMBER SCHOLAR, VICE-PRESIDENT
CENTER FOR PROGRESSIVE REFORM**

**BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
OF THE
SENATE COMMITTEE ON THE JUDICIARY**

**HEARING ON
PROTECTING THE PUBLIC INTEREST: UNDERSTANDING THE THREAT OF
AGENCY CAPTURE**

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Mr. Chairman and Members of the Committee, thank you for inviting me here today to share with you my views on understanding the threat of agency capture and its relationship to protecting the public interest.

I am the University Distinguished Professor of Law and an Associate Dean at the Wake Forest School of Law. I am also a Member Scholar and Vice-President of the Center for Progressive Reform (CPR) (<http://www.progressivereform.org/>). Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of sixty scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary.

My work on regulation and administrative law includes six books, seven book chapters, and over fifty articles (as author or coauthor). I just finished a book on administrative accountability published by the University of Chicago Press, coauthored with Professor Rena Steinzor: *The People's Agents and the Battle to*

*Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment.*¹ I have served as consultant to government agencies and have testified before Congress previously on regulatory subjects.

The performance of government agencies is crucial for two reasons. Agencies not only have important roles to play in protecting the health and safety of the public and the integrity of the environment, their performance is an important aspect of democratic accountability. When Congress passes and the president signs legislation, the failure to achieve these commitments devalues the democratic processes that produced the legislation and the commitments made in those laws. As Senator Whitehouse has pointed out, the Minerals Mining Services, which utterly failed to carry out Congress' intentions to regulate off-shore drilling, is a glaring example of how the public interest can be damaged by a captured agency.²

Agencies fall short of achieving their statutory missions for a variety of reasons, but "agency capture" is one the most significant causes. The classic definition of agency capture (or regulatory capture) is that the industry being regulated is able to gain control over the regulatory process, diverting it from protecting the public.³ The academic literature reveals that industries are captured an agency through three processes:

- Political capture: Agencies become captured when the President appoints administrators who spend their time in office as an opportunity to stymie the efforts of the career staff to adopt new regulations and enforce the ones already on the books.
- Representational Capture: Agencies become captured when they hear only from the industries being regulated because the public lacks representation before the agency.

¹ RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT* (2010).

² *Senator Whitehouse Slams Corporate Influence at Minerals Management Service, Proposes Legislation to Defend Integrity of Government*, U.S. FED. NEWS, June 18, 2010.

³ See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 3 (2nd ed. 1971) (providing the classic definition of agency capture).

- Sabotage Capture: Agencies become captured when the opponents of regulation, through legislation and executive orders, create roadblocks that slow or prevent regulation even in administrations that seek to protect the public and the environment.

My testimony will explain these sources capture and offer some recommendations concerning how Congress might strengthen the administrative system to resist them.

POLITICAL CAPTURE

The type of capture that receives the most attention is when an agency fails to protect the public and the environment apparently because regulators friendly to industry, appointed by presidents who are hostile to regulation, block regulatory efforts or do not enforce the laws and regulations then in effect. The situation at MMS, noted earlier, is a good example.

The concept of capture is a term from political science, and as such, expresses the idea that a business friendly administration is in power, and it rewards its supporters by adopting regulatory positions they favor. In other words, it is a description of what has happened. As a normative matter, regulatory critics, dispute that this form of capture is necessary a bad thing. Having won an election, they contend that a president who is skeptical of regulation is entitled to appoint administrators who likewise are skeptical of regulation.

The situation is different, however, when capture involves the failure to administer and enforce the laws on the books. Instead of going to Congress to seek appropriate amendments of the law, business-friendly presidents have pursued a strategy that in effect repeals it without changing the law. It is one thing to promulgate a regulation that may be somewhat weaker than consumers or environmentalists might prefer, but which is still legally permissible, it is entirely another matter to stymie the development of needed regulation or to weaken the enforcement of rules that are already on the books.

REPRESENTATIONAL CAPTURE

The second form of capture occurs when there is an imbalance in representation. An agency is likely to adopt an industry-friendly point of view if the only people that it hears from, or primarily hears from, are members of the industry itself. As Professor Howard Latin has explained:

Industry representatives appear regularly in agency proceedings and can usually afford to offer detailed comments and criticisms on possible agency decisions, while environmental groups intervene on an intermittent basis and the unorganized public seldom participates at all. This routine asymmetry will increase agency responsiveness to industry criticism. No matter how sincere and public spirited officials are when appointed, a process of negative feedbacks will produce shifts toward the positions espoused by regulated parties.⁴

In the 1960s and 1970s, the courts and Congress sought to redress this imbalance by making it easier for public interest groups to participate in the rulemaking process⁵ and by making government decision-making more transparent.⁶ Despite these developments, representational capture remains a problem because corporations and their trade associations have a substantial resource advantage which permits them to dominate the rulemaking process most of the time at most agencies.

A 1977 Senate committee report found that large regulated parties had a significantly greater presence in agency decision-making processes than did public

⁴ Howard Latin, *Regulatory Failure, Administrative Incentives and the New Clean Air Act*, 21 ENV'T L. L. 1647, 1673 (1991).

⁵ The courts expanded rulemaking notice requirements, established a strong presumption that agency action and inaction were subject to judicial review, liberalized standing requirements for citizens' groups that sought judicial review, empowered public interest groups to represent statutory beneficiaries in federal court, and required agencies to have "adequate" explanations for their actions. Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1746 (2008).

⁶ Congress passed the Freedom of Information Act 26 (FOIA), the Federal Advisory Committee Act²⁷ (FACA), and the National Environmental Policy Act of 1969²⁸ (NEPA), which were intended to make it difficult for agencies to adopt industry-friendly policies behind closed doors. *Id.*

interest groups and outside parties.⁷ More recent evidence suggests that the situation has not changed.

Scott Furlong's study of registrations required by the Lobbying Disclosure Act indicates that business lobbyists who lobby the Executive Branch outnumber public interest by more than 10 to 1.⁸ This dominance translates into higher rates of participation in rulemakings. A survey of Washington-based interest groups by Furlong and Neal Kerwin found that individual businesses participated in over twice the number of rulemakings as other types of organizations.⁹ An earlier survey by Furlong found that business interests submitted many more comments on proposed regulations than other interests did.¹⁰

This dominance also translates into higher rates of comments in rulemakings. Jason Webb Yackee and Susan Webb Yackee, who studied forty rules promulgated by four agencies from 1994 to 2001, found business interests filed 57% of the comments; governmental interests filed 19% of the comments; and nonbusiness, nongovernmental interests submitted 22% of the comments. Public-interest-group comments constituted only 6% of the total of comments submitted by nonbusiness, nongovernmental interests.¹¹

⁷ STAFF OF S. COMM. ON GOVERNMENT AFFAIRS, 96TH CONG., PRINCIPLE RECOMMENDATIONS AND FINDINGS OF THE STUDY ON FEDERAL REGULATION 25 (Comm. Print 1979).

⁸ Scott R. Furlong, *Exploring Interest Group Participation in Executive Branch Policymaking*, in THE INTEREST GROUP CONNECTION 282, 290-91 (Paul S. Herrnson et al. eds., 2d ed. 2005).

⁹ Examining lobbying reports for 1996, Furlong identified registrants who indicated that they sought to influence environmental and natural-resource issues and that they lobbied both Congress and the Executive Branch. Over 94% of these registrants were business or trade associations, while only about 3% of the registrants were public interest groups. Furlong found a similar situation when he looked at the clients of lobbying firms. Over 73% of the clients listed were business interests as compared to about 6% who were public interest groups. Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rulemaking: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 361 (2005).

¹⁰ Furlong, *supra* n. 8.

¹¹ Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006). The four agencies were OSHA, the Employment Standards Administration (ESA), the Federal Railroad Administration (FRA), and the Federal Highway Administration (FHA). The study selected all rules receiving fewer than two hundred comments but more than one comment.

Melissa Golden, who examined comments filed on eleven proposed regulations at three agencies, found the same business dominance.¹² The dominance was greatest for the eight rules proposed by EPA and NHTSA. Corporations, public utilities, and trade associations filed between 66.7% and 100% of the comments concerning these rules, and neither EPA nor NHTSA received any comments from public interest groups concerning five of the eight rules. 73

Cary Coglianese, who studied twenty-five significant EPA rules promulgated under the Resource Conservation and Recovery Act (RCRA) between 1989 and 1991, found that business interests participated 95% of the time, national trade associations participated 80% of the time, and citizen groups participated 12% of the time. Groups representing regulated industries constituted 59% of all participants, and groups representing environmental and citizen groups constituted 4%.¹³

Finally, Professors Wendy Wagner, Katherine Barnes and Lisa Peters While, who studied 39 controversial and technically complex hazardous air pollutant rules, found that industry averaged 77.5 percent of the total comments while public interest groups averaged only 5 percent of those comments. In fact, public interest groups filed comments for only 46 percent of the rulemakings. Prior to the start of a rulemaking, industry accounted for an average of 83.6 of the informal communications, while public interest groups averaged 0.65 percent of those communications.¹⁴

¹² Marissa Martino Golden, *Interest Groups in the Rulemaking Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 250, 252 (1998). The three agencies were EPA, NHTSA, and the Department of Housing and Urban Development (HUD)..

¹³ Steven P. Croley, *Theories of Regulation. Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 129 (1998), *citing* Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* 46-47 tbl.2-x (1994) (unpublished Ph.D. dissertation, University of Michigan).

¹⁴ Wendy E. Wagner, Katherine Barnes, & Lisa Peters, *Air Toxics in the Board Room: An Empirical Study of EPA's Hazardous Air Pollutant Rules* (Nov. 13, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531243.

Evidence that the business community has more lobbyists and participates more frequently in filing rulemaking comments does not establish that business interests always prevail in the administrative process. Nevertheless, the superior funding of the business community is a significant source of representational capture.

SABOTAGE CAPTURE

The final form of capture receives less attention, but it is no less effective in preventing reasonable regulation than the other forms of capture. Agencies become captured when the opponents of regulation, through legislation or executive orders, create roadblocks that slow or prevent regulation even in administrations that seek to protect the public and the environment.

Because this form of capture is subtle and difficult for the public to perceive, it constitutes “sophisticated sabotage” of the regulatory process. Sophisticated sabotage involves policies and reforms that appear to be reasonable, but their impact is to “monkey-wrench” the regulatory process.¹⁵ This form of capture has created systematic regulatory failures across the government, as evidenced by:

- Late, slow, and even nonexistent efforts to tackle the most obvious and pressing threats to public health, worker safety and the environment;
- Failure of the most rudimentary implementation efforts – absence of routine inspections of manufacturing facilities, delays in writing or renewing permits that control industrial activities, fatal mistakes in the approval of new drugs and the monitoring of drugs already on the market, and abdication of responsibility for the safety of the growing number of imported foods and consumer products; and,
- The collapse of enforcement of regulatory requirements against consistent violators and scofflaws.¹⁶

¹⁵ See THOMAS O. MCGARITY, SIDNEY SHAPIRO & DAVID BOLLIER, *SOPHISTICATED SABOTAGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION* (2004).

¹⁶ Sidney Shapiro, Rena Steinzor, & Matthew Shudtz, *Regulatory Dysfunction: How Insufficient Resources, Outdated Laws, and Political Interference Cripple the “Protector Agencies,”* August, 2009, at 3 (CPR White Paper), available at http://www.progressivereform.org/articles/RegDysfunction_906.pdf.

Funding

The inability of regulatory agencies to act swiftly and decisively in the last several decades is attributable in no small part of severe shortfalls in funding. As deficits grow, and economic anxiety deepens, the President and Congress return again and again to cuts in the discretionary portion of the budget. This has opened the door for regulatory opponents to defund the agencies based on the apparently reasonable proposition that we cannot afford better regulatory protections.

As a result, four important regulatory agencies (CPSC, EPA, OSHA, NHTSA) have not received significant increases in their budgets since roughly 1980, approximately a decade after they were created, once inflation is taken into account.¹⁷ A fifth agency (FDA) has escaped this fate only because the pharmaceutical industry pay fees to support the new drug approval process.

OSHA's difficulty in promulgating a new regulatory standard for cranes and derricks illustrates the impact of budget cuts. In 1971, it issued regulations for the use and operation of cranes, derricks, and other heavy machinery at construction sites. As of August, 2009, OSHA had not updated this rule despite vast changes in technology and work processes. Beginning in the mid-1990s, industry itself began petitioning OSHA for stronger and more comprehensive regulations and in 2004 a committee of industry, labor, and government representatives reached agreement on a draft proposed rule. But five years later, this rule was still trapped somewhere in OSHA, waiting to be issued. Meanwhile, by OSHA's own estimates, 89 crane-related deaths and 263 crane-related injuries occur each year, and the draft rule would reduce these numbers by 59 percent. Thus, for every year the rule sat on a desk, 53 people die and another 155 were injured unnecessarily.¹⁸

¹⁷ STEINZOR & SHAPIRO, *supra* n. 1, at 65.

¹⁸ Catherine O'Neill, Amy Sinden, Rena Steinzor, James Goodwin, and Ling-Yee Huang, *The Hidden Human and Environmental Costs of Regulatory Delay*, October, 2009, at 13 (CPR Whitepaper), available at http://www.progressivereform.org/articles/CostofDelay_907.pdf.

Throughout the delay period, industry representatives, members of the rulemaking committee, OSHA representatives, and Members of Congress all expressed overwhelming support for the draft rule and urged final approval. When OSHA first publicly acknowledged the need to update the rule in 1999, it was in response to repeated requests by industry representatives. In July 2008, a group of senators wrote an open letter to Secretary Chao, calling the regulatory delay—both the failure to update the rule since 1971 and the four-year delay in submitting the draft rule to the OMB—“unfathomable.”¹⁹

But the delay is fathomable. OSHA lacks the resources to complete it in a timely manner, as an OSHA spokesman explained:

You know, the timelines, it's very difficult to predict these dates. You know, we don't work independently. We work with a number of different agencies within OSHA. Those different parts of OSHA have projects other than our project and so inevitably there is some competition of resources and, you know, the agency as a whole has been working on many, many projects concurrently.²⁰

While the White House and members of Congress contend that the country cannot afford to do better, the budgets of the five agencies mentioned earlier are irrelevant to the federal budget and the deficit. The total amount spent in 2008 operating these five agencies was 0.29 percent of the total budget that Congress approved on April 2, 2009, and 0.89 percent of the \$1.2 trillion deficit projected for FY 2010.²¹

While the argument that is necessary to reduce spending on regulatory agencies might appear reasonable on its face, it is foolhardy. While no reliable estimates have ever been prepared of the costs of regulatory failure and delay, one only has to look at a regulatory failure to see why the budget cuts are penny wise and pound foolish.

¹⁹ *Id.* at 15.

²⁰ *Id.* at 14-15 (quoting Noah Connell, the director of OSHA's Office of Construction Standards and Guidance).

²¹ STEINZOR & SHAPIRO, *supra* n. 1, at 56.

Consider, for example, that the peanut industry alone suffered \$1 billion in losses, nine people died, and 20,000 were sickened as a result of the salmonella outbreak at a Georgia peanut processing plant during the fall and winter of 2008–2009; the recall of 2,100 types of products containing the tainted nuts must have cost much more.²² And, of course, from the perspectives of the families who lost loved ones, the loss was priceless. The plant was inspected and given a clean bill of health by an unqualified private-sector inspector paid by the peanut plant operator and hired under pressure from the plant owner's largest customers. The peanuts were shipped despite the owner's receipt of tests showing salmonella from an independent testing lab.

Multiply this single incident by countless episodes in the workplace, the pharmacy, the grocery store, and the playground on a code red air pollution day, and cumulative, quantifiable costs, not to mention non-quantifiable losses, are likely to dwarf the cost of making the regulatory system effective.

Political Interference

Over the last 30 years, the work that Congress delegated to agencies because of the specialized training and expertise of their staffs, has increasingly come under strict oversight and control by the White House. This effort has had two effects that constitute sabotage capture.

First, it slows the regulatory process. Today, agencies might have to go through more than 100 discrete analytical steps before they can adopt a regulation.²³ Peter Barton Hurt, a former FDA general counsel now in private practice, has noted the burden imposed on FDA:

[I]n order to promulgate a regulation, the FDA must at a minimum include, in the preamble, not only full consideration of all substantive issues raised by

²² STEINZOR & SHAPIRO, *supra* n. 1, at 71.

²³ Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLORIDA ST. L. REV. 533 (2000).

the regulation itself, but also a cost-benefit and a cost-effectiveness analysis, an environmental impact discussion, a federalism evaluation, a small business impact statement, a determination whether there is an unfunded mandate impact on state or local governments, an analysis of paperwork obligations, and an assessment on the impact on family well-being. . . . However well-intentioned, these responsibilities place a major burden on the FDA and require that scientific resources be diverted from other areas in order to assure compliance.²⁴

The most important regulatory impact requirement is Executive Order 12,866, which requires a cost-benefit analysis of the proposed rule, a requirement that many in Congress and the White House think is a reasonable requirement. After all, who could oppose studying the costs and benefits of a proposed rule? But, as extensive literature demonstrates, this effort is largely a waste of time, and thus another example of sophisticated sabotage.²⁵

Second, White House oversight has led to the undermining of Congress's goal of regulating health and safety based on expert analysis of the science and policy. This is illustrated by the evolution of EPA's Integrated Risk Information System (IRIS):

In 1985, EPA staff determined that there was a need to develop a centralized database of all the various chemical risk assessments that were being developed around the agency's program and regional offices. These risk assessments were the cornerstones of regulatory decisions ranging from how to control toxins in the air and water, to how clean the soil would have to be at Superfund sites around the country. From 1985 until 2004, EPA scientists in the Office of Research and Development (ORD) coordinated the addition of new chemical assessments to the IRIS database. But in 2004, John Graham, Administrator of the Office of Information and Regulatory Affairs (OIRA) ... initiated a complete redesign of the IRIS assessment process that would eventually give OMB a powerful voice in every stage of the scientific assessment process. Congressional staff have uncovered evidence that individuals at OMB went so far as to make editorial comments on specific chemical profiles, "comments that would have changed the import and meaning of the scientific findings" made by EPA scientists.

²⁴ Peter Barton Hutt, *The State of Science at the Food and Drug Administration*, 60 AD. L. REV. 432, 439-40 (2008) (footnotes omitted).

²⁵ See, e.g., Sidney A. Shapiro & Christopher Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENV. L. REV. 433 (2008); see also, FRANK ACKERMAN AND LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

Since the White House became intimately involved in the IRIS assessment process, EPA staff have struggled to cope with the added political pressures. Only a few chemical profiles are added to the database each year, ultimately hampering EPA's ability to develop second generation air pollution regulations and cleanup standards for major Superfund sites²⁶

The White House oversight of EPA's efforts to set a national ambient air quality standard (NAAQ) for ozone is another good illustration of how regulatory review leads to sophisticated sabotage.²⁷ As explained in my book:

... In 2003, the American Lung Association sued the EPA over the delay [in revising the ozone NAAQ], and the agency agreed to a court order stipulating that it would promulgate revised standards no later than March 12, 2008....

The agency's revisions were based on an elaborate process that took several years and involved the preparation by staff scientists of lengthy documents that assessed and summarized the state of the relevant research. Those documents were then reviewed by the Clean Air Science Advisory Committee (CASAC), a panel of outside scientists established by the Clean Air Act. The CASAC ... recommended unanimously, in itself an unusual outcome, that the EPA revise both the primary and the secondary standards to even lower levels than those selected by Stephen Johnson, the EPA administrator. The proposed new standards were published for comments, the EPA staff reviewed all the comments, and a final notice was prepared. Johnson sent it over to the White House, expecting it to be approved in time for a press conference he had scheduled for March 12, 2008.

On March 6, 2008, Susan Dudley, the director of the OMB's OIRA, wrote Johnson a memorandum explaining that she disagreed with the secondary NAAQS issued by the EPA and planned to appeal the issue to the president.... Dudley argued that the EPA should have considered economic values in setting the standard. Johnson's deputy administrator, Marcus Peacock, responded on behalf of the agency that cost was not a legally permissible criterion under the act.²⁸ President Bush ultimately sided with Dudley, and

²⁶ *Regulatory Dysfunction*, *supra* n. 16, at 12-13.

²⁷ Ozone is formed when nitrogen oxides combine with volatile organic compounds in the presence of sunlight. Excessive amounts of ozone are quite harmful to people and animals, exacerbating respiratory diseases like asthma. Ozone pollution is also harmful to crops, forests, and other vegetation, which can die or have their growth severely stunted. Consequently, the act instructs the agency to set a "primary" standard to protect people and a "secondary" standard to protect natural resources. STEINZOR & SHAPIRO, *supra* n. 1, at 204.

²⁸ The statute requires that limits be set without regard to cost, at whatever level is sufficient to protect health and the environment with an "ample" margin of safety. The Supreme Court has

the secondary standard was revised to be the same as the primary standard. Administrator Johnson announced the decision, defending it as a loyal soldier representing his president. But Dr. Rogene Henderson, chair of the CASAC and a leading national expert on air pollution, subsequently told Congress that as a result of the OMB's interference, "Willful ignorance triumphed over sound science."²⁹

REDUCING CAPTURE

The multifaceted problem of capture is a serious threat to the viability of the safety, health, and environmental legislation that Congress has passed. If Congress can reduce capture, it is more likely that agencies can fulfill its intention to protect people and the environment. Congress can reduce capture by improved oversight, better coordination between authorization and appropriations committees, by employing positive metrics, and by considering "true-up" budgets.

Improved Oversight

Congress cannot count on the administrative law system to ensure the accountability of the regulatory agencies. As noted, public interest groups lack the resources to match up with industry in terms of advocacy before agencies and the courts. As a result, many times they are not in a good position to address capture, whether it occurs because of political capture or information capture. Likewise, they are often not in a good position to call to Congress' attention to capture. It is therefore up to Congress to institute more systematic oversight to address these problems. Such oversight is possible even when a party is in the minority, as Representative Henry Waxman's efforts during the Bush Administration demonstrated.

interpreted this language to mean that the EPA can only consider adverse effects and not the costs of reducing ozone, an outcome fiercely opposed by industry groups. *Id.* at 204.

²⁹ *Id.* at 204-205.

Linking Oversight and Appropriations

The defunding of the regulatory agencies has been justified by the necessity of reducing the budget deficit. The regulatory agencies, however, are such a small part of the discretionary budget that Congress could give them modest increases in funding without affecting the annual budget or deficit in any significant manner.

One reason Congress appears to have failed to consider this possibility is that there has been insufficient attention paid to the downside of the funding shortfalls. One way for Congress to have this conversation is for the authorization committees to study the impacts of the funding cuts on the agencies within their jurisdictions and to share this information with the appropriation committees.³⁰ This would put Congress in a better position to consider what funding tradeoffs are involved in refunding the regulatory agencies, and whether funding them is a higher priority than other items in the budget.

Positive Metrics

One reason the deterioration of regulatory government has gone relatively unnoticed is that Congress lacks a good means for measuring the performance of the regulatory agencies. Congress could address this gap by requiring the development of rigorous and concise “positive metrics” that would alert Congress and the public when health and safety agencies have run into trouble.³¹

This is not an entirely new idea. Some federal and regional agencies have experimented with “indicator” reports, which are generally focused on ambient conditions, or pollution levels, in various environmental media (air, water, or soil).³² The most aggressive effort to exact accountability is the Government Performance

³⁰ STEZINOR & SHAPIRO, *supra* n. 1, at 61-65.

³¹ *Id.* at 173-91.

³² See, e.g., U.S. EPA, Office of Research and Development and the Office of Environmental Information, *Draft Report on the Environment: Technical Document*, EPA 600-R-03-050 (Washington, DC: EPA, 2003), <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=30005E2Z.txt>; U.S. EPA, *EPA's Report on the Environment*, EPA/600/R-07/045F (Washington, DC: EPA, 2008), <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1002S1J.txt>.

and Results Act of 1993 (GPRA), passed in 1993.³³ The concept underlying the GPRA—holding agencies accountable by scrutinizing their actual performance—is unassailable. But, what is necessary is the measurement of performance on the basis of positive metrics that invite a diagnosis of the impediments that prevent agencies from achieving their statutory missions. Such metrics would attract public attention to agency successes and shortcomings, producing early warning signs that can motivate a search for potential solutions.

The concept of positive metrics differs from previous reporting requirements in another fundamental way. While the elaborate paperwork that these programs have generated is easy to recover from the internet, one has to be a knowledgeable stakeholder to get any satisfaction out of reading these arcane narratives. These documents represent the essence of “inside baseball,” making them unintelligible to congressional staff and reporters, much less the general public. To be successful, positive metrics must be sufficiently concise and accessible that they could interest and inform regulatory outsiders.

It will be no easy task boiling down the existing morass of data about agency performance. Moreover, there is a crucial distinction between identifying regulatory gaps and actually addressing the causes of these problems. Nevertheless, Congress should consider the concept of positive metrics as a way of providing to it crucial information about agency performance. When the metrics indicate that agencies are significantly failing to make progress, then Congress is in a position to assess whether this is due to political, information, or sabotage capture, or some other cause, such as insufficient legal authority.

True-Up Estimates

The congressional dialogue over funding would be improved if agencies were required to make it clear how much money it would really take to implement their

³³ Public Law 103-62, U.S. Statutes at Large 107 (1993): 285, codified in scattered sections of U.S. Code titles 5 and 31.

regulatory mandates. Such “true-up estimates” should focus on the resources the government itself would need, calculated in constant dollars over a decade-long period, to do the work involved in enforcing or modifying existing rules and developing new ones.³⁴

CONCLUSION

The problem of capture is persistent, suggesting that it is not easily remedied. In the 1970s, the Senate undertook a major study on federal regulation.³⁵ A similar effort, focused on capture and including consideration of such new ideas as positive metrics and true-up budgets, may be in order. The newly reformed Administrative Conference of the United States (ACUS) could be tasked with this investigation.

³⁴ STEINZOR & SHAPIRO, *supra* n. 1, at 69-70; 226-27

³⁵ See *supra* n. 7.