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Agency Hygiene

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See Also

Response

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Agency capture is a little like the weather: everybody complains about it, but nobody does anything about it. It's not hard to see why. Once capture becomes an entrenched feature of agency culture, it can be difficult to uproot. By definition, the political dynamic will reflect an unappealing mix of well-organized, well-heeled interest groups and a relatively apathetic and disinterested public. Efforts by Congress or the Executive Branch to eliminate capture are unlikely to pay political dividends and will probably antagonize powerful interest groups. Complacency seems the better course—for everyone but the public at large.

The resistance of capture to political correction suggests that the most effective way to address capture will be to create conditions in which it is unlikely to flourish. On that front, Rachel Barkow has made an exceedingly important contribution.[1] She has provided nothing less than an instruction manual for conscientious legislators who, when grasping the rare political opportunity to create or reshape an agency, aim to insulate that agency from undue interest-group pressure. And she has done so by moving the debate over insulation away from its myopic focus on formal independence from presidential control to the on-the-ground bureaucratic conditions that profoundly affect agency decisionmaking.

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1. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 TEXAS L. REV. 15 (2010).

But Barkow's piece leaves largely unanswered the problem of what to do with an agency that has already been captured. Although nothing in principle prevents Congress from reshaping existing agencies along the lines she suggests, experience suggests that we might wait a very long time for Congress to enact structural reforms. After all, what's in it for Congress? Voters are unlikely to appreciate or care very much if Congress overhauls agency structure, and groups with a vested interest in sustaining capture would immediately marshal their resources to defeat such reforms. Most of the time, structural reform will be a political nonstarter.

Worse still, even the most conscientiously designed agency can sometimes be captured. (As does Barkow, I use the word "capture" as shorthand for the phenomenon whereby regulated entities wield their superior organizational capacities to secure favorable agency outcomes at the expense of the diffuse public.[2] So understood, capture is a regulatory manifestation of public choice theory.[3]) Barkow herself recognizes that none of her suggestions, taken alone or together, is a panacea. After all, they diminish not one whit the incentives of well-organized interest groups to *try* to capture the agencies that regulate them. And while these groups will have a harder time capturing a well-defended agency—well, even Troy was eventually sacked.

So what is to be done about a captured agency? As I will explain below, the political branches need two things to eliminate capture: good information and political will. They need information in order to establish whether capture has taken hold, to understand the contours of the relevant capture dynamic, and to suggest agency-specific strategies for ameliorating capture. More significantly, the political branches also need the will to implement those strategies even in the face of stiff resistance from well-funded groups with a potent interest in perpetuating the status quo.

Both information and political will are, however, in short supply. They need not be. As I will explain, Congress can and should establish a body housed within the Executive Branch and vested with the authority to investigate allegations of capture and document the existence of capture dynamics where they arise. Adequately funded and appropriately staffed, this body would coordinate with offices of inspectors general across the federal bureaucracy to identify capture where it occurs. At the same time, Congress should create legislative mechanisms to spur action on the recommendations of this newly instituted body.

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2. *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284–92 (2006) (providing a brief intellectual history of capture theory); Barkow, *supra* note 1, at 21, n.23.

3. For a terse discussion of the contours of modern public choice theory, see JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 10–21 (1997).

The hope is that these regulatory reforms would work as a kind of agency hygiene—a routine and modestly uncomfortable process designed to forestall the development of a much more serious problem. Properly implemented, this sort of oversight would neatly complement Barkow's much-needed suggestions for structural reform.

I. Information

After seven people were killed in the September 9, 2010 explosion of a natural-gas pipeline in California, the diligence of the Pipeline and Hazardous Materials Safety Administration ("PHMSA") was—yet again—called into question.[4] Over the past decade, reports from the Government Accountability Office[5] and the Congressional Research Service[6] have consistently raised concerns about the capacity of PHMSA to ensure the safety of oil and gas pipelines. These concerns are not trivial: over the past five years, accidents involving pipelines have killed 60 people, injured 230, and inflicted millions of dollars in property damage.[7]

So has PHMSA been captured? It's certainly possible. Where the energy industry is relatively well organized and highly motivated, the public is generally uninterested in questions about the safety of oil and gas pipelines. (Who, after all, has even heard of PHMSA?) Given these representational imbalances, the agency's lackluster performance could very well be the product of capture.

But capture is by no means the only explanation or even the most likely one.[8] It is also possible that the agency has been derelict in carrying out its responsibilities because it lacks the regulatory authority to pursue violators or because its resources are stretched too thin. (Careful, though: the lack of authority and resources may—or may not—be a function of the way that imbalanced interest-group pressures play out in Congress.) Or maybe PHMSA is staffed by incompetents. Or maybe the agency isn't deficient at all, and we tolerate the occasional explosion of oil and gas pipelines because the costs of eliminating them would be prohibitive. Looking closer, the

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4. Andrew W. Lehren, *Millions of Miles of Pipe, and Years of Questions*, N.Y. TIMES, Sept. 25, 2010, at A1.

5. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-801, PIPELINE SAFETY: MANAGEMENT OF THE OFFICE OF PIPELINE SAFETY'S ENFORCEMENT PROGRAM NEEDS FURTHER STRENGTHENING 13 (2004).

6. *See, e.g.*, PAUL W. PARFOMAK, CONG. RESEARCH SERV., RL33347, PIPELINE SAFETY AND SECURITY: FEDERAL PROGRAMS 15–16 (2008).

7. *See* Lehren, *supra* note 4, at A1.

8. KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 344 (1986) ("Capture is not by any means the norm, and where capture occurs, it does not always last."); PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 31–32, 177 (1981) (testing incentives related to capture theory at four federal agencies and finding it wanting).

problem grows even more complex. In practice, PHMSA concentrates its inspection duties on those pipelines that cross state lines and depends on state regulatory agencies to police the safety of intrastate pipelines.[9] Focusing only on PHMSA thus misses a significant aspect of the problem: maybe the agency resists capture but nonetheless finds its best efforts undermined by state agencies that are themselves captured.

Diagnosing capture at PHMSA would thus require good information, and a lot of it. The problem is not unique to this agency. To reliably identify capture, we first need to know what an interest group has done to pull the levers of influence at an agency (regulatory *inputs*). 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 we also have to examine what the agency has done (regulatory *outputs*). Has it declined to exercise its enforcement authority? Has it watered down regulations at industry's behest? Has it foregone regulating 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 undue pressure from regulated interests?

That's a hard question to answer. Isolating the various factors that shaped a particular agency decision is hard enough. Showing that the one that made a difference was the result of pressure from regulated entities is another matter altogether. (The problem is similar to trying to figure out whether political donations have corrupted a legislator. Money sometimes buys influence, but it's difficult 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's blatant. But most of the time capture will be much harder to ferret out.

Part of the trouble is that agency capture is less a discrete regulatory pathology than a complex of problems. The schematic of the iron triangle suggested by George Stigler[10] has long since given way to "more subtle explanations of industry orientation."[11] And although these explanations rest on the shared insight that regulated entities will generally have enormous organizational advantages over the dispersed public in advocating for their preferred regulatory outcomes, they otherwise have little in common. Agencies are denominated "captured" (or, if you prefer, "dominated"[12])

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9. *See* 49 U.S.C. § 60105(a) (2006).

10. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (arguing that "regulation is acquired by the industry and is designed and operated primarily for its benefit").

11. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1685–86 (1975).

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

when they depend too much on the industries they regulate for information, political support, or guidance;[13] when the "revolving door" between agency and industry allows industry groups to influence agency appointments and tempt regulators with benefits;[14] when industry effectively leverages its influence with those elected officials responsible for overseeing the agency;[15] and so on and so forth. The moral is that capture can take hold in myriad ways.[16]

The adaptability of capture theory suggests that careless application of the capture label can obscure rather than illuminate the bureaucratic dynamics that lead to capture. That, in turn, can complicate efforts to craft a remedy. Compounding the problem is a tacit but persistent misconception that arises in part from our choice of language. When we say an agency is "captured," we suggest that the agency has been thoroughly tamed and is beholden in all important respects to well-organized interests. This in turn suggests that all other agencies ably resist interest-group pressures. But there can be no binary sorting of agencies as "captured" or "not captured." Agencies are almost never the unthinking pawns of organized interests; by the same token, rarely are they immune from interest-group influence.[17] Capture is a question of degree.

Nor does capture always announce itself boldly. Sometimes it does: outright bribery, although rare, is one means by which regulated entities might capture an agency.[18] More commonly, however, agencies can participate in a capture dynamic even when they act in good faith to carry out their assigned missions. A diligent agency might find itself overwhelmed if regulated entities have pressured legislators to slash its funding. Or the agency might sensibly avoid tackling a controversial problem because drawing the ire of influential senators or congressmen would distract from other priorities. Or the agency might depend on information from the affected entities and lack the means or ability to review that information skeptically. Or the agency might come to see the world the way that its regulated entities do. From the agency's perspective, interest-group capture

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13. Bagley & Revesz, *supra* note 2, at 1285.

14. SCHLOZMAN & TIERNEY, *supra* note 8, at 342.

15. Barkow, *supra* note 1, at 22.

16. *See* SCHLOZMAN & TIERNEY, *supra* note 8, at 341 ("Just as there is no single theory of the origins of regulatory capture, there is no single explanation of how capture is perpetuated.").

17. *See* Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 271–72 (1987) (observing that regulatory regimes necessarily benefit some groups, and that those groups will normally "attempt to sustain or even improve these beneficial results").

18. *Cf.* Philip Shabecoff, *Jury in E.P.A. Case Finds Lavelle Guilty of Perjury*, N.Y. TIMES, Dec. 2, 1983, at A1 (recounting the criminal conviction of an EPA administrator for impeding Congressional investigations into hazardous waste programs).

is just one aspect of the (often inhospitable) regulatory milieu in which it operates.[19]

The bottom line is that capture is subtle and can manifest in very different ways at different federal agencies. Because properly tailored solutions depend on a clear-eyed understanding of the capture dynamic at work at a particular agency, robust information about whether an agency has been captured—and, if so, how—is essential. As it stands, however, no institutional body is well positioned to undertake the sorts of investigations that would unearth this kind of fine-grained, contextual information. Those that come closest—the Government Accountability Office (GAO) and the various offices of the inspector general—have serious limitations.

GAO is the investigative arm of Congress, and it has a solid reputation for high-quality, non-partisan investigative work. It even sometimes documents the shortcomings of agencies (like the Consumer Product Safety Commission (CPSC), for example[20]) that are widely understood to be captured. But GAO is typically called into play at the request of congressional committees or subcommittees.[21] That puts GAO at the mercy of those very members of Congress who may participate in the capture dynamic. More significantly, because it is a congressional agency and was established to serve Congress, GAO might understandably be reluctant to scrutinize the legislative influence that private groups wield.[22] Overlooking that influence, however, would miss an important piece of the puzzle.

For their part, inspectors general (IGs) have brought to light several of the most egregious examples of agency capture. Even before the Deepwater Horizon spill, for example, reports from the Interior Department's IG detailed inappropriate contacts between employees at the Minerals Management Service (MMS) and representatives of the oil industry.[23]

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19. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 31 (1989) ("In the United States, high-level government executives are preoccupied with maintaining their agencies in a complex, conflict-ridden, and unpredictable political environment, and middle-level government managers are immersed in the effort to cope with the myriad constraints that this environment has imposed on their agencies.").

20. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-97-147, CONSUMER PRODUCT SAFETY COMMISSION: BETTER DATA NEEDED TO HELP IDENTIFY AND ANALYZE POTENTIAL HAZARDS 22 (1997) (reporting that data collected by the CPSC is "generally insufficient to support thorough and detailed analysis"); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-803, CONSUMER SAFETY: BETTER INFORMATION AND PLANNING WOULD STRENGTHEN CPSC'S OVERSIGHT OF IMPORTED PRODUCTS 13 (2009) (finding that "CPSC's authorities have the potential to be effective," but that "implementation is limited by competing priorities and resource and practical constraints").

21. *About GAO,* U.S. GOV'T ACCOUNTABILITY OFFICE (2010), http://www.gao.gov/about/index.html.

22. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 728 (1986) (observing that the Comptroller General, who heads GAO, is removable by Congress "'at any time'" (quoting 31 U.S.C. § 703(e)(1) (1982))).

23. Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, N.Y. TIMES, Sept. 11, 2008, at A1; Noelle Straub, *Interior Probe Finds Fraternizing, Porn and Drugs at MMS Office*

Reports from the IG at the SEC have likewise generated scrutiny over the revolving door between industry and the agency.[24]

IGs have three enormous advantages in identifying capture. First, they are fiercely independent and are unlikely to be tainted by capture pathologies that might affect their parent agencies.[25] Second, IGs have virtually unlimited access to both the documents and personnel of the agencies that they oversee.[26] And third, IGs work within the agency, giving them the opportunity to develop a context-rich understanding of agency operations and the regulatory environment.[27] Without that kind of contextual knowledge, an investigator would have a hard time judging when regulators are shirking their duties at the behest of regulated entities.

But IGs are principally reactive, not proactive, agencies, and are concerned more with monitoring compliance than enhancing performance.[28] Indeed, their principal charge is to identify fraud, waste, and abuse[29]—not to undertake the more taxing inquiry into whether the influence of regulated entities has shaped regulatory outputs in a manner inimical to the agency's mission. In addition, the IGs' narrow focus on their parent agencies discourages broader inquiries into the various means by which industry groups bring pressure to bear on those elected officials with authority over the agency.

A better solution would be to designate a separate investigative body, housed within the Executive Branch, to police the federal regulatory bureaucracy—including the independent agencies—for symptoms of capture. With a possible caveat I explore below, its role would be to monitor and

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in La., N.Y. TIMES (May 25, 2010), http://www.nytimes.com/gwire/2010/05/25/25greenwire-interior-probe-finds-fraternizing-porn-and-dru-45260.html?emc=eta1.

24. *See* U.S. SEC. & EXCH. COMM'N, OFFICE OF INSPECTOR GEN., SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2009–MARCH 31, 2010, at 55 (2010) (finding an apparent violation of ethics rules prohibiting former government employees from "working on matters in which that individual participated as a government employee"); U.S. SEC. & EXCH. COMM'N, OFFICE OF THE INSPECTOR GEN., CASE NO. OIG-526, INVESTIGATION OF THE SEC'S RESPONSE TO CONCERNS REGARDING ROBERT ALLEN STANFORD'S ALLEGED PONZI SCHEME 28 (2010) [hereinafter INVESTIGATION OF THE SEC'S RESPONSE TO STANFORD'S ALLEGED PONZI SCHEME] (same).

25. *See* Inspector General Act of 1978, 5 U.S.C. app. 2 § 3(a) (2006) (providing that IGs at cabinet-level agencies "shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability").

26. *See id.* § 6(a)–(b) (providing IGs with broad access to records and mandating investigatory assistance from agency heads).

27. *See id.* § 6(c) (requiring agencies to give IGs office space within "central and field office locations").

28. *See* PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 16 (1993) (noting that IGs have become "instruments of retrospective, or backward-looking, compliance rather than catalysts for either performance incentives or capacity building").

29. Inspector General Act of 1978, 5 U.S.C. app. 2 § 2(2); *see also* LIGHT, *supra* note 28, at 40 (calling "fraud, waste, and abuse" the "three horsemen" of the IG concept).

report, not to act or implement.[30] The idea would be to capitalize on the doggedness with which single-mission agencies tend to pursue their regulatory goals and to develop concentrated expertise on the slippery concept of capture. The agency's relative independence from Congress would give it a distinct advantage over GAO. And the body's commitment to addressing an endemic but subtle problem would be a marked improvement over generalist IGs that focus on fraud and abuse.

What precisely would the body be looking for? Given the various tools that regulated entities have at their disposal to pressure an agency, the body's charge would have to be both broad and open-ended. At any given agency, the body might examine agency–industry contacts, communications between the agency and individual congressmen, or political contributions flowing from regulated entities to members of the subcommittee charged with overseeing the agency.[31] It might solicit the unvarnished views of civil servants about whether appointed officials thwarted the agency's mission by systematically deferring to the interests of regulated groups.[32] It might probe whether agency officials exchanged regulatory favors for promises of future employment.[33] It might examine enforcement patterns and investigate whether and why the agency declined to press certain types of actions.[34] In short, the investigatory body would seek to understand the constraints under which the agency operated and make a judgment about the degree to which those constraints arose as the result of untoward pressure from regulated entities.

With a mandate this broad, the central challenge for this new organization—a sort of centralized public advocate designed solely to probe capture pathologies[35]—involves staffing. On the input side of the ledger, identifying capture requires a thorough investigation not different in kind from a criminal or civil probe. Agency officials will have to be interviewed;

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30. *Cf.* LIGHT, *supra* note 28, at 16 (noting that IGs "are to look, not act; recommend, not implement").

31. *See* Eric Lipton, *3 Congressmen May Face Further Inquiry*, N.Y. TIMES, Sept. 1, 2010, at A13 (reporting on lawmakers who held fund-raising events with lobbyists and executives of financial firms "just days before they voted on financial regulatory legislation last year").

32. *See* H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., MAJORITY STAFF REP.: FDA CAREER STAFF OBJECTED TO AGENCY PREEMPTION POLICIES 4 (2008) (noting that FDA "ignored the warnings from FDA scientists and career officials" that a generous policy toward pharmaceuticals "was based on erroneous assertions").

33. *See* Leslie Wayne, *Ex-Pentagon Official Gets 9 Months for Conspiring to Favor Boeing*, N.Y. TIMES, Oct. 2, 2004, at C1 (reporting the admission of a former Air Force procurement official that a military contractor "would not have been selected for some military projects or would have received lower payments if not for her efforts to obtain jobs for herself, her daughter and her son-in-law").

34. *See* INVESTIGATION OF THE SEC'S RESPONSE TO STANFORD'S ALLEGED PONZI SCHEME, *supra* note 24, at 17 (critiquing the SEC practice of prosecuting easy cases to inflate "stats" and ignoring complex, but more serious, frauds).

35. *See* Barkow, *supra* note 1, at 62–64 (discussing public advocates).

emails will have to be read; money will have to be tracked. The core of the agency would therefore be made up by seasoned investigators, preferably those with experience at offices of the inspector general or investigating white-collar crime. On the output side, officials with expertise in regulatory enforcement and lawyers who understand the relevant legal context will have to review agency decisions to discern whether poor performance is the result of outside pressure.

Even staffed by crack investigators and top-flight experts on bureaucracy, however, this new agency would still lack familiarity with the complexities of most regulatory environments. Without experts in finance, for example, the agency could not exercise meaningful oversight of the SEC or of the banking agencies. But where developing in-house expertise would be expensive and cumbersome, the new body would not work alone. It would instead coordinate closely with IGs, particularly when pursuing claims that individual agency employees had been corrupted by regulated interests. The body's insistent focus on agency capture might even prompt IGs to pursue allegations of untoward influence with more vigor—to "pick up their socks," as Senator Whitehouse put it during a recent hearing on capture.[36] The new body should also be empowered to select agency employees for temporary details to educate the body's permanent staff about the agency's operations and to aid in investigations.[37]

Although there are several risks to this approach, they are modest. First, a body that is exquisitely attuned to capture might too readily diagnose it. To a hammer, everything looks like a nail. And if innocuous contact with regulated entities could lead to a charge of capture, agencies might decide it's not worth the risk. That would be unfortunate. Without open communication with their regulated entities, agencies cannot reliably secure the information and cooperation they need to regulate effectively. But while this is a real concern, I think it is unduly pessimistic. An agency devoted to eliminating the very real problem of capture is likely to have a robust sense of what capture is—and is not. There is no particular reason to think that it will systematically pillory agencies for their contacts with regulated entities absent evidence that those contacts are distorting the agency's mission.

Second, what's to stop this new body from itself being captured? Here the answer is straightforward. Because the new body would monitor agencies that themselves regulate thousands upon thousands of different

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36. *Protecting the Public Interest: Understanding the Threat of Agency Capture: Hearing Before the S. Subcomm. on Admin. Oversight and the Courts of the S. Judiciary Comm.*, 111th Cong. (2010) (statement of Sen. Whitehouse), *webcast available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=4746 (statement at 93:30).

37. *See, e.g.*, Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 125(d)(3), 122 Stat. 3765, 3793 (to be codified at 12 U.S.C. 5233) (permitting agencies to "detail, on a reimbursable basis, any of the personnel of that department or agency to the [congressional] Oversight Panel to assist it in carrying out its duties under this Act").

entities in wide-ranging industries, it would be difficult for a single interest group to dominate the agency.[38] In addition, agencies assigned narrow tasks appear to resist organized pressure more effectively than agencies that have conflicting responsibilities.[39] Certain subagencies within the Department of the Interior, for example, have been plagued by capture in part because they are charged both with promoting development and with protecting the environment.[40] The agency must prioritize one task at the expense of the other, meaning that industry-group pressure can easily cement an agency's preference for the task that favors industry.[41] That would not be a problem for a new body charged with monitoring for capture—especially given that such an agency is likely to take a rather dim view of organized efforts to subvert its mission.

Third, funding this sort of body would cost real money. The new agency would have to hire investigators, regulatory specialists, and lawyers—and a good number of them. There would be additional costs associated with the diversion of the time and energy of agency officials who must cooperate with ongoing investigations. Again, however, these concerns are modest. If agency capture is a widespread and destructive feature of the regulatory state, then it seems worthwhile, all else being equal, to devote a trivial share of the federal budget to this sort of hygienic oversight.

II. Political Will

But will an investigatory body actually do much to fix capture? It's no secret (as Barkow points out) that the hapless Consumer Product Safety Commission (CPSC) has been captured.[42] But while Congress has tinkered at the margins of the CPSC's statutory authority,[43] it hasn't undertaken anything remotely resembling the structural overhaul that the agency so

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38. *Cf.* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1148–50 (1990) (explaining that capture is less likely to take hold at bodies beholden to diverse interest groups).

39. *See* Eric Biber, *Too Many Things To Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 7 (2009).

40. *See id.* at 3 ("[F]ederal public land management agencies have been accused of systematically privileging one or more of their goals—often related to economic development—over others—often related to environmental protection.").

41. *Matthew* 6:24 (King James) ("No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.").

42. Barkow, *supra* note 1, at 65–72.

43. Congress recently enacted a reform bill in response to the public outcry over lead paint in children's toys. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 101, 122 Stat. 3016, 3017 (to be codified at 15 U.S.C. 1278a). The early returns suggest that the legislation has fallen short of revitalizing the agency. *See, e.g.*, Andrew Martin, *Toy Makers Fight for Exemption from Rules*, N.Y. TIMES, Sept. 29, 2010, at A1 (noting that CSPC commissioners have failed on three separate occasions to reach an agreement on the definition of "children's product").

desperately needs. The point illustrates an unfortunate fact: it's not enough to know that an agency is too solicitous of the entities that it regulates. The political branches, operating in a toxic political environment dominated by groups with vested interests in the poor performance of the agency, must also muster the political will to do something about it.

Several possible means suggest themselves for encouraging Congress or the Executive Branch to respond to confirmed and specific reports of agency capture. As an initial matter, reports are not all created equal. Although most are ignored, some are bestsellers.[44] The credibility of the source makes an enormous difference. Placing the capture oversight body within the White House (probably within the Office of Management and Budget) would confer upon it enormous credibility. A scathing and persuasive White House report documenting the existence of a captured agency is likely to attract substantial media attention and would be relatively hard to ignore. As Barkow notes in a related context, giving an agency "the power to generate and disseminate information that can sway votes can go a long way" toward overcoming public apathy and encouraging reform.[45]

The key here is leveraging the source of the information to draw public attention. Placing the new body within the White House would likely give its recommendations the most heft. The choice, however, is not without risk: the President, who is himself sometimes beholden to well-heeled interest groups,[46] could derail investigations into agencies that have cozy relationships with those favored groups. This would be of particular concern in an administration that disliked the congressionally assigned missions of various federal agencies and therefore aimed to enhance their attentiveness to regulated entities at the expense of their regulatory goals.[47] But this risk largely dissipates upon closer review. A hostile administration is unlikely to attend to the recommendations of a capture czar, wherever it's located and however it's designed. A capture-oriented agency can at most prompt action from politicians willing in principle to take its concerns seriously. It cannot and should not be expected to overcome a profound aversion to its mission.

In any event, alternative placements are less appealing. Housing the body within the Department of Justice might distance it from the President somewhat, but such a placement might also put the Department in an awkward position with agencies that it regularly represents as clients—a concern that would be particularly salient if reports about agency capture form the backdrop to litigation challenging agency action. Making it a

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44. *E.g.*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).

45. Barkow, *supra* note 1, at 59.

46. *See* Bagley & Revesz, *supra* note 2, at 1305–06.

47. *See* SCHLOZMAN & TIERNEY, *supra* note 8, at 346 (observing that during the early 1980s, "EPA was not so much captured by industry as donated to it by the Reagan administration").

congressional agency would, as with GAO, compromise its ability to identify capture dynamics that depend in part on the participation of legislators. And establishing the body as a new independent agency risks consigning it to regulatory backwaters along with the CPSC.[48] Lacking the stature of the SEC or the Fed, much less a natural constituency, an independent capture czar is unlikely to attract the public notice necessary to provoke a political response to documented reports of capture.

Locating the office within the White House would also make its recommendations more difficult for the President to ignore. This is significant. Even without congressional cooperation, the Executive Branch can take immediate and dramatic steps to short-circuit a capture dynamic. There are the obvious tools. The President could lean on an agency's political leadership, who, given the relatively short time they might expect to head the agency, might have preferred to devote their energies elsewhere; demand the documentation and disclosure of industry–agency relationships; install internal review mechanisms; and monitor agency performance more closely.

But the Executive Branch will also in many cases have the authority to overhaul the very structure of the agency, perhaps embedding within it some of the structural reforms that Barkow advocates. Shortly after the Deepwater Horizon spill, for example, the Obama Administration split MMS into three separate agencies, each with a single, clearly defined mission, in part to address concerns relating to capture.[49] The Administration found legal authority for this move in a 1950 reorganization plan, approved by Congress, that transferred to the Secretary of the Interior the authority of his subordinates and permitted the Secretary to "authoriz[e] the performance by any other officer . . . of the Department of the Interior of any function of the Secretary."[50] Similar statutes apply to the Commerce Department,[51] the Labor Department,[52] the Federal Trade Commission,[53] the Securities and Exchange Commission,[54] the Department of Homeland Security,[55] the Treasury Department,[56] and (in varying degrees) most federal agencies. The fact that the President retains this sort of structural control over much of the

48. *Cf.* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 282–87 (1955) (documenting capture at independent agencies).

49. SEC'Y OF THE INTERIOR, U.S. DEP'T OF THE INTERIOR, ORDER NO. 3299 (2010).

50. 5 U.S.C. app. Reorganization Plan No. 3 of 1950 § 2 (2006).

51. 5 U.S.C. app. Reorganization Plan No. 5 of 1950 § 2 (2006).

52. 5 U.S.C. app. Reorganization Plan No. 6 of 1950 § 2 (2006).

53. 5 U.S.C. app. Reorganization Plan No. 8 of 1950 § 2 (2006).

54. 5 U.S.C. app. Reorganization Plan No. 10 of 1950 § 2 (2006).

55. 6 U.S.C. § 112(a)(3), (b)(1) (2006).

56. 31 U.S.C. § 321(b)(2), (c) (2006) (but declining to vest in the Secretary the duties of administrative law judges, the Comptroller of the Currency, and the now-defunct Office of Thrift Supervision).

federal bureaucracy means that he would own the problem—and could not readily disclaim responsibility for addressing it.

To raise the visibility of the new body, Congress could establish procedural rules requiring congressional committees to hold public hearings on any report documenting capture at a federal agency. Congress does this from time to time. A 1991 immigration statute, for example, provides that the Chairman of the Senate Judiciary Committee "shall hold a hearing respecting [a particular] report" submitted by the Comptroller General.[57] A similar approach could be employed here: the Senate Judiciary Committee or the House Committee on Oversight and Government Reform (or subcommittees thereof) could be instructed to hold public hearings "respecting the reports" issued by the new body within a set period of time and even report to the full Congress with the committee's recommendations.[58] In a similar vein, Congress could require the Executive Branch to detail how it intends to address concerns raised by the new entity, much as agency heads already respond to GAO and IG reports upon their issuance.

Should a purely hortatory body's efforts prove inadequate, however, it might be worth exploring alternative means for shifting the presumption toward action rather than inaction. One provocative idea would be for Congress to require the Executive Branch to implement any proposals from the new body (at least those that don't require new spending) unless Congress formally objects—even if those proposals diverge from prior legislation. This is not unprecedented. In the recent health-care reform legislation, for example, Congress established an independent commission to issue legislative proposals for reducing Medicare payment rates.[59] If Congress fails to enact a competing proposal that reduces Medicare spending to the same degree, or if the President vetoes the bill that Congress enacts, then the Secretary of the Department of Health and Human Services must implement the commission's proposal "[n]otwithstanding any other provision of law."[60] A similar approach could be employed to address capture. Having identified a capture dynamic, the new body would draft concrete proposals

57. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 202(b)(2), 105 Stat. 1733, 1737 (codified as amended at 8 U.S.C. § 1101 note).

58. S*ee* H.R. REP. NO. 100-747, pt. 1, at 3 (1988) (reporting favorably on amendments requiring hearings on an agency report and providing that the relevant Senate committee "shall issue a report not later than 270 days after that date which describes the findings and recommendations of the committee regarding . . . appropriate action").

59. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3403(a), 124 Stat. 119, 489 (2010) (to be codified at 42 U.S.C. § 1395kkk); *cf.* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 231, 306 (codified as amended at 8 U.S.C. § 1103 note) (authorizing the Secretary of Homeland Security, in his "sole discretion," to "waive all legal requirements" pertaining to the border fence "[n]otwithstanding any other provision of law").

60. Patient Protection and Affordable Care Act § 3403(e)(1), 124 Stat. at 499.

that would automatically go into effect within a set period. Congress would of course have a chance to weigh in on the matter. But the presumption would be reform, and voting to upend that presumption and perpetuate a capture dynamic could exact a stiff political price.

This muscular approach would confer enormous power on the new body, perhaps even to the point of provoking a serious nondelegation challenge.[61] And it would also change the nature of the agency, requiring it to supplement its investigative role with the quasi-legislative task of drafting proposals to eliminate capture. Taking such a step before learning more about how the political branches respond to a purely investigatory body's reports is probably too hasty. But if capture remains an intractable problem, it would be worth considering alternatives that put a heavy thumb on the scales in favor of reform.

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As I explained at the outset, the key to preventing capture is structuring agencies so that it does not take hold in the first place. On that front, Barkow's piece offers a much-needed guide for Congress when it seeks to insulate federal agencies from interest-group pressures. But we must be realistic. Legislative opportunities to overhaul existing agencies will be few and far between. In the meantime, installing a body within the White House to monitor for capture and to suggest means for addressing it would go far towards preventing regulated entities from co-opting their regulators. This sort of day-to-day agency hygiene would hardly be a complete solution, and it would by no means substitute for properly structuring an agency in the first place. But it would be a start.

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61. *But see* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (observing that "the conventional doctrine has had one good year, and 211 bad ones (and counting)").