

Statement of Senator Sheldon Whitehouse
“Federal Regulation: A Review of Legislative Proposals, Part II”
U.S. Senate Committee on Homeland Security and Government Affairs
July 20, 2011

Chairman Lieberman, Ranking Member Collins, and members of the Committee, thank you for inviting me to testify about my proposals to improve our regulatory system by rooting out and preventing regulatory capture.

Federal regulations touch broad swaths of American life. They are a key reason that highway deaths have fallen to their lowest levels in 60 years, that we have clean drinking water, and that our food producers are held to high safety standards. By preventing injury, illness, and environmental harm, effective and appropriate regulations also save the country money. Cass Sunstein, the administrator of OMB’s Office of Information and Regulatory Affairs, recently explained, for example, that in the first two years of the Obama Administration, the net benefit of regulations exceeded \$35 billion for Americans.

There are two major hazards to regulation, however. One is unwise or obsolete regulation. The Obama Administration appropriately has begun an effort to target and eliminate such regulations. The other is regulatory capture.

“We the People” pass laws through our democratic and open American process of lawmaking. Regulated industries and other powerful interests then seek to “capture” the agencies that enforce those laws to avoid their intended effect, seeking regulations and enforcement practices that protect their limited private interests. Regulatory capture both violates fundamental principles of the American system of government, and, as we saw in the Gulf, can lead to disaster.

The concept of regulatory capture is well established in economic, regulatory, and administrative law theory, appearing in the research of Nobel Laureate George Stigler, the writings of President Woodrow Wilson, the opinion pages of the *Wall Street Journal*, and innumerable textbooks and hornbooks. Agreement on the subject is broad: during a hearing on regulatory capture that I chaired last year, the witnesses all agreed on each of the following seven propositions. First, regulatory capture is a real phenomenon and a threat to the integrity of government. Second, regulated entities have a concentrated incentive to gain as much influence as possible over regulators, opposed by a diffuse public interest. Third, regulated entities ordinarily have substantial organizational and resource advantages in the regulatory process when compared to public interest groups. Fourth, some regulatory processes lend themselves to gaming by regulated entities seeking undue control over regulation. Fifth, regulatory capture by its nature happens in the dark – done as quietly as possible (no industry puts up a flag announcing its capture of a regulatory agency). Sixth, the potential damage from regulatory capture is enormous. And finally, effective congressional oversight is key to keeping regulators focused on the public interest.

We have seen the devastation in the Gulf of Mexico that occurred after the Minerals and Management Service was captured by the industry it was supposed to regulate. The cost of that disaster in lives and economic well-being, as well as the human toll of what I would contend was capture at the Mine Health and Safety Administration and the SEC, should be a call to action to

finally address in the political world this problem of regulatory capture. The doctrine has an undeniable basis in academic regulatory theory and in the precepts of administrative law. We've known about it for a hundred years; we've seen it in action; but we have never yet done anything specific to prevent it.

I have introduced the Regulatory Capture Prevention Act to create an office within the Office of Management and Budget that would investigate and report on regulatory capture wherever it may appear. The office would shine a light into neglected corners of the regulatory system, and would sound the alarm if a regulatory agency were showing the symptoms of capture. Its ability to bring scrutiny and publicity to the dark corners where regulatory capture flourishes would strengthen the integrity of our regulatory agencies.

To provide even more sunlight into agency action, a second bill, the Regulatory Information Reporting Act would require regulatory agencies to report to a public website three important pieces of information: first, the name and affiliation of each party that comments on an agency regulation; second, whether that party affected the regulatory process; and finally, whether that party is an economic, non-economic, or citizen interest. This information would inform effective public scrutiny and congressional oversight of who seeks to influence regulatory behavior and who succeeds.

Thank you again for inviting me to testify. I appreciate the opportunity to explain why Congress should pursue efforts to prevent regulatory capture. People may disagree about particular cases, but I hope we can all recognize that powerful special interests have a constant interest in capturing our regulatory agencies and that we have a systemic interest on behalf of ordinary Americans in preventing that capture.