

Remarks by Senator Warren
“Tilting the Scales: Corporate Capture of the Rulemaking Process”
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Paul, thank you for the kind introduction, and thank you all for having me here today.

I wish I could have been with you throughout this conference because I believe that regulatory capture is a big deal. It is one more way in which powerful corporations rig the system to work for themselves—and the rest of America pays the price.

One aspect of the problem is that law enforcement treats powerful corporations with kid gloves. I recently put out a report – called *Rigged Justice* – that lists 20 examples from 2015 alone of weak-kneed enforcement against big corporations and their senior executives.¹ There’s essentially a two-tiered legal system, one for giant corporations and one for everyone else. The message is clear: for the wealthy and powerful, following the law is merely optional. In a country that has etched “Equal Justice Under Law” above the doors to the Supreme Court, this is an ugly truth.

But today, I want to focus a different part of regulatory capture—the capture of agencies as they write the rules. Because here, too, the game in Washington tilts sharply in favor of big businesses.

Let’s start with the obvious: it is really, really hard to pass a law through Congress that helps working families. There are plenty of lobbyists in Washington, but they aren’t laboring on behalf of working families.

The tilt in Congress is pretty much out there for everyone to see. Lots of concern about preserving trillions in tax breaks for big companies, but not much help for seniors trying to scrape by on Social Security. Lots of concern for giant banks that want looser regulations and oversight, but not much help for people paying high interest on student loans. It’s disgraceful, but at least it’s visible.

¹ Office of Senator Elizabeth Warren, *Rigged Justice: 2016*, January 2016, available at http://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf.

But corporate influence works its magic even better in the shadows—and that’s where rulemaking occurs. Thanks to corporate influence, the rulemaking process often becomes the place where strong, clear laws go to die.

Consider the fight for financial reform. Following the worst financial crisis in three generations – one that resulted in taxpayers spending hundreds of billions to bail out the big banks – Congress passed the Dodd-Frank Act to make sure that kind of crisis never happened again. Main Street went toe-to-toe with Wall Street. We lost some battles, and we also won some major victories.

But passing that law wasn’t the end—it was just the beginning. To implement the law, Dodd-Frank required federal regulators to write literally hundreds of different rules. The big banks and their friends knew that each one of those rules presented a golden opportunity to undermine, pervert, or simply undo the work of Congress. One lobbyist referred to the day Dodd-Frank was passed as “halftime”² – and the big banks have been lobbying the agencies aggressively ever since.

Wall Street understands what the public too often forgets: the public battle is in Congress, but even if the industry loses, there are more chances to weaken or overturn that law in the agencies and the courts. Giant corporations and their lobbyists devote enormous resources to influencing agency rulemaking, and it pays off handsomely.

My message this afternoon is simple: when it comes to undue industry influence, our rule-making process is broken from start to finish. At every stage – from the months before a rule is proposed to the final decision of a court hearing a challenge to that rule – the existing process is loaded with opportunities for powerful industry groups to tilt the scales in their favor.

The tilt starts early. For example, a 2011 study of EPA records from 1994 to 2009 found that industry groups held a virtual monopoly over informal communications with the EPA that occurred before proposed rules on hazardous air pollutants were publicly available. On average, industry groups engaged in *170 times* more informal communications with the EPA than public interest players – communications that occurred **before** any proposed rules were even written.³ Similarly, Dodd-Frank included a provision called the Volcker Rule to stop banks from engaging in certain kinds of risky behavior. Before that rule could be written, groups representing Wall Street interests met with federal regulators 419 times, accounting for over 93 percent of meetings

² B. Roth, *Lobbyists' focus: How a law becomes a rule*, Roll Call, Dec. 13, 2010, available at http://www.rollcall.com/issues/56_58/-201389-1.html.

³ Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Emission Standards*, 63 Admin. L. Rev. 99, 125 (2011).

between federal regulators and external parties about the Volcker Rule. Less than 7 percent of meetings were with individuals and groups representing the public interest.⁴

As rules wind their way through the process, the lobbying intensifies. When proposed rulemaking notices are published and the public has a formal opportunity to weigh in, their views are quickly buried in an avalanche of detailed, well-funded, well-credentialed comments from industry insiders and their highly-paid allies. Those EPA rules I just mentioned on dangerous air pollutants? Industry groups submitted 81 percent of the comments during the notice-and-comment period. Public interest groups submitted 4 percent.⁵

Some observers argue that this resource mismatch has a smaller impact with agencies than with Congress.⁶ Unlike congressional action, agency rules are constrained by well-established judicial review standards that seek to determine whether the agency's action is supported by the evidentiary record and the authority delegated to it by Congress. Rules must be supported by "substantial evidence"; agency actions must not be "arbitrary and capricious."⁷

But corporate players are savvy. They have learned that those same judicial review standards can be used to suffocate new rules. Companies don't simply photocopy the same comments and jam up an agency's inbox with identical assertions. They play a much more sophisticated game – leveraging their own expertise and paying outside experts with purportedly independent credentials to produce long, detailed comments filled with data and analyses, all selectively produced to serve their own interests.⁸ This push to bury agencies in detailed, self-serving comments slows the process massively, and their overall dominance of the notice-and-comment process results in rules that are longer, more complicated, and more to the liking of the most powerful players in the game.

Over the last few decades, additional barriers to rulemaking have popped up. Requirements include conducting cost-benefit analyses and evaluating the impact of the rule on small businesses and the environment.⁹ Sometimes these processes result in better rules, but often these are just more obstacles that result in even longer, more complex rules, and even more

⁴ Kimberly D. Krawiec, *Don't 'Screw Joe the Plummer': The Sausage-Making of Financial Reform*, 55 *Ariz. L. Rev.* 53, 80 (2013).

⁵ Wagner, Barnes & Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Emission Standards*, *supra* note 3, at 128-29.

⁶ *See, e.g.*, Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government*, 140-42 (2008).

⁷ *See generally* Elizabeth Magill, *Courts and Regulatory Capture*, in *Preventing Regulatory Capture* (2014).

⁸ Tom Hamburger, *How Elizabeth Warren picked a fight with Brookings--and won*, *Washington Post*, Sep. 29, 2015, available at https://www.washingtonpost.com/politics/how-elizabeth-warren-picked-a-fight-with-brookings--and-won/2015/09/29/bfe45276-66c7-11e5-9ef3-fde182507eac_story.html.

⁹ Public Citizen, *The Federal Rulemaking Process*, <http://www.citizen.org/documents/Regulations-Flowchart.pdf>.

opportunities for well-heeled industry players to slow things down and build in exceptions to benefit themselves.

Consider the Office of Information and Regulatory Affairs, or OIRA, the tiny, obscure, and incredibly powerful agency that reviews significant regulatory proposals developed in other parts of the government before they can take effect. A study of interest group meetings with OIRA showed that between October 1, 2001 to June 1, 2011, OIRA met with five times as many representatives of industry as with people representing public interest groups.¹⁰ And just last year, two professors at the University of Wisconsin-Madison released a report that showed a strong correlation between interest groups lobbying OIRA and changes in the final rules that favored those interest groups.¹¹

These procedures tie agencies into bureaucratic knots and bleed much-needed resources. Often agencies just give up entirely on writing new rules. It is possible to see this happening in instances where Congress or the courts have directed an agency to issue a specific rule by a specific time. A recent study of such deadlines between 1996 and 2014 showed that over 50 percent of final rules were not finished on or before their mandated deadlines.¹² That's right: more than half the time, federal agencies did not meet legally mandated deadlines.

For example, Dodd-Frank was passed almost six years ago, but as of today, agencies still haven't finalized nearly one quarter of its required rules.¹³

These delays can put lives at risk. Five years ago, Congress passed the FDA Food Safety Modernization Act to revamp food safety laws. Regulations were due in 2012. Many weren't published until 2015, and then only after a court ordered the FDA to publish the regulations.¹⁴

¹⁰ Rena Steinzon, *The Case for Abolishing Centralized White House Regulatory Review*, 1 Mich. J. Envtl. & Admin. L. 209, 263 (2012).

¹¹ Simon F. Haeder and Susan Webb Yackee, *Psst, wanna change the law? Lobby this little-known government office after it's passed*, Washington Post, July 27, 2015, available at <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/07/27/psst-wanna-change-the-law-lobby-this-little-known-government-office-after-its-passed/>.

¹² S. Atherley, *Federal Agency Compliance with Regulatory Deadlines*, R Street Policy Study No. 39, 1, August 2015, available at <http://www.rstreet.org/policy-study/federal-agency-compliance-with-congressional-regulatory-deadlines/>.

¹³ Davis Polk, *Dodd-Frank Progress Report*, Fourth Quarter 2015, available at http://prod.davispolk.com/sites/default/files/Q4_2015_Dodd-Frank_Progress_Report.pdf.

¹⁴ Joe Satran, *FDA Moves On Food Safety A Mere Three Years Behind Schedule*, Huffington Post, Sep. 11, 2015, available at http://www.huffingtonpost.com/entry/fda-food-safety-regulations-finally_us_55f1f4b8e4b093be51be46ff.

Meanwhile, every year, 3,000 Americans were dying from foodborne illnesses, and 48 million Americans—one in six—was getting sick from contaminated food.¹⁵

In 2008, a dam at the Tennessee Valley Authority Power Plant broke, dumping 1.1 billion gallons of coal ash sludge into a nearby community, damaging over 100 homes and contaminating a river and several streams. Within a year, the EPA sent OIRA a proposed rule regulating disposal of hazardous coal ash waste – but a vigorous lobbying campaign by the coal industry froze the proposal, and it took five more years for a rule to emerge from OIRA.¹⁶

Even if an agency manages to jump through all the hoops and withstands all the pressure and actually issues a final rule, companies sue.

In theory, the threat of a corporate lawsuit over a rule that's too strong should be counterbalanced by the threat of a public interest lawsuit over a rule that's too weak – or isn't issued at all. But here again, the rules governing judicial review favor those who would stop the agency from acting in the public interest. Under the law, it is easy for business groups to challenge a rule for being too strong or too restrictive. But it's much harder for public interest groups or ordinary citizens to challenge a rule for being too weak or riddled with loopholes. And it's nearly impossible to successfully challenge an agency for not acting at all.¹⁷

And, boy, does this take a toll over time. I talk with agency heads who are like beaten dogs—just trying to keep their heads down. This is even more true for the agency general counsels. It's hard to go up against a well-financed machine that will use every tool at its disposal to overturn years of work, and it's a lot easier to give in and write a softer rule—or no rule at all. Over time, the lobbyists' work gets done by the agencies' own lawyers who get so risk averse that they kill off agency action before it even gets off the ground.

To be clear, engaging in informal dialogue, participating in notice-and-comment, and going to court when agencies step out of line are not bad things. But over time, bludgeoning agencies into submission undercuts the public interest. The goal should be to have a system where influence over new rules is measured not by the size of the bankroll, but by the strength of the argument.

¹⁵ Centers for Disease Control and Prevention, *Foodborne Germs and Illnesses*, <http://www.cdc.gov/foodsafety/foodborne-germs.html>.

¹⁶ Steinzon, *The Case for Abolishing Centralized White House Regulatory Review*, *supra* note 11, at 225; *see also* Rena Steinzor, *EPA Sends Coal Ash Rule to OIRA*, CPR Blog, Oct. 28, 2015, *available at* <http://www.progressivereform.org/CPRBlog.cfm?idBlog=58609D71-0591-A766-D5533AF96DA1DAFC>.

¹⁷ *See generally* Elizabeth Magill, *Courts and Regulatory Capture*, in *Preventing Regulatory Capture* (Daniel Carpenter and David A. Moss eds., 2014).

Here are a few principles to that would balance the scales.

First, increase transparency. The more sunlight that shines on agency processes – and on industry efforts to influence them – the more likely it is that an agency’s final product will reflect the public interest. A good start would be to disclose all meetings between agencies and interested parties, both before and during rulemaking. Another would be to help agencies and courts distinguish between legitimate, high-quality data and research, on the one hand, and bought-and-paid-for studies on the other, by requiring disclosure of financial arrangements and editorial relationships associated with regulatory comments. And anyone who wants to cite their own data should have to publish the dataset online—sure, there need to be safeguards to protect anonymity, for example, but get the data out there where other people can test drive it.

Second, level the playing field between public and private interests. The net effect of a notice-and-comment process dominated by business advocates is that severely under-resourced public interest advocates are simply out-gunned. States have experimented with systems that build a public advocate into the regulatory process or that compensate public interest advocates who invest resources to produce meaningful feedback on rules.¹⁸ Similarly, judicial review of agencies needs to be reformed to give the public a fighting chance to challenge weak rules, agency inaction, and agency capture.

Third, simplify. Complex rules take longer to finalize, are harder for the public to understand, and inevitably contain more special interest carve-outs that favor big business interests over small businesses and individuals. Complex rules are also more reliant on industry itself to provide additional detail and expertise – and that means more opportunities for capture.¹⁹ Simple works better.

Fourth, limit opportunities for cultural capture. Regulators should be beholden to the American people, not to corporate benefactors. Two ideas: crack down on the revolving door, and end golden parachutes for executives who enter government. In 2013, the Project on Government Oversight released a report showing that major corporations routinely offer their executives financial incentives—to the tune of hundreds of thousands, even millions, of dollars—for accepting government positions.²⁰ The Financial Services Conflict of Interest Act, a bill introduced by Senator Baldwin and Representative Cummings, would make these payments illegal under the federal bribery statutes and would target conflicts of interest by removing

¹⁸ *Id.*

¹⁹ See Nolan McCarty, *Complexity, Capacity, and Capture*, in *Preventing Regulatory Capture*, at 103-12 (Daniel Carpenter and David A. Moss eds., 2014).

²⁰ Michel Smallberg, *Big Businesses Offer Revolving Door Rewards*, Project on Government Oversight, Mar. 21, 2013, available at <http://www.pogo.org/our-work/reports/2013/big-businesses-offer-revolving-door-rewards.html?print=t>.

government employees from decisions that financially benefit their former employers.²¹ That's a good start.

Finally, give agencies the money they need to do their jobs. Writing rules, responding to thousands of comments, and separating valuable data from self-serving nonsense takes capable people with adequate resources. Starving the regulators is the quickest way to ensure this work is essentially outsourced to the regulated industries themselves.

Regulatory reform is a popular idea, but too many proposals are supported by the industries to be regulated precisely because those proposals would create even more opportunities for them to block regulations they don't like. Regulatory reform is badly needed, but the reforms must address the central problem—a tilted playing field that benefits the rich and powerful.

It won't be easy. These folks won't willingly give up its power and influence. But this is about building a government that works not just for those at the top, but for all of us. Thanks for having this conference.

²¹ Financial Services Conflict of Interest Act, S.1179, 114th Congress (2015).