CHAPTER 10

Did Industry Capture EPA Enforcement? Captive Agency Theory and Its (Partial) Applicability

EPA's varied enforcement experiences raise a further question that deserves systematic attention: has the Agency enforcement program been "captured" by the entities that EPA monitors and regulates? This chapter examines the extent to which the captive agency theory, first articulated in 1955 by Princeton University professor Marver Bernstein in his influential book, *Regulating Business by Independent Commission*,[1] applies to EPA's enforcement work. After summarizing Bernstein's theories of administrative regulations as a paradigm of captive agency theory, and describing the legislative reforms of the 1970s and 1980s that attempted to take account of the insights and criticisms of captive agency theorists in reshaping key facets of U.S. administrative law, I will critically evaluate Bernstein's captive agency theory in light of the key trends, developments, and events in EPA regulation and enforcement.

The basic notion of the captive agency theory of administrative agencies is that such agencies have a tendency to move so far in the direction of accommodating the interests of the entities they are charged with regulating that ultimately these agencies may be fairly considered a "captive" of those regulated firms.[2] Captive agency theory typically views regulators as subject to unique pressures and influences that invariably push their actions and their decisions on policy questions in a direction favored by regulated firms. Among other things, the theory posits, captive agencies tend to be unduly inefficient, passive, and ponderous, failing to enforce their own regulatory requirements with needed vigor and enthusiasm.[3]

This chapter assays the extent to which the captive agency theory first formulated by Bernstein continues to have viability as an explanation of the behavior of federal regulatory agencies in the twenty-first century in

general and EPA in particular. It asks whether the theory is still valid and if so how and to what extent.

EPA and its enforcement work seem an apt subject of study in this context for several reasons. First, in a number of respects, the regulatory legislation under which EPA operates was fashioned by Congress with certain lessons from captive agency theorists in mind. The Agency's authorizing statutes (the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, etc.) tend to be lengthier, more detailed, and more directive of specific agency actions than the legislation that authorized the independent commissions (such as the Interstate Commerce Commission, the Securities and Exchange Commission, and the Civil Aeronautics Board) that Marver Bernstein studied in the early 1950s. EPA's authorizing statutes also include provisions for judicial review, and for lawsuits by private citizens to enforce Agency standards and requirements, and they give EPA power to regulate a broad range of industries, rather than only one or a small number of industries (as had been common prior to the 1970s). If EPA is a captive agency notwithstanding these legislative reforms, one may well conclude that captive agency theorists were far more effective at diagnosing administrative maladies than they were at prescribing cures for them.

EPA *enforcement* work is also highlighted because other scholars have concluded that administrative agency enforcement efforts are especially vulnerable to capture by regulated activities.[4] Enforcement takes place at low visibility. It lacks the regularity and transparency of agency rule making, and it often calls for close interactions between government regulators and individual companies. If agency capture can be found anywhere, it therefore seems likely to be manifested in the enforcement context.

In the middle years of the 1950s, Marver Bernstein set out to evaluate critically the role of independent regulatory commissions.[5] Focusing on seven such federal agencies,[6] *Regulating Business By Independent Commission*, a slim, concise volume, also had two other objectives: to develop a more realistic concept of governmental regulation than that which supported the commission form and to appraise the independent commission as an agent of governmental regulation at the national level.[7]

Bernstein's book began with a two-chapter overview of the intellectual development of the regulatory movement.[8] From the efforts of the agrarian, post–Civil War Granger movement to establish state commissions that regulated railroad practices in rates and competition, Bernstein traced the evolution of U.S. regulatory reform through the Progressive

Era (1906–1917), the decade of the Great Depression, and World War II and its aftermath. He noted that progressive reformers of the early twentieth century were urban, middle-class citizens who believed in purifying government of fraud and corruption by tinkering with the machinery of government, making government more efficient by using sound business management methods, and allocating responsibility to independent, nonpolitical regulatory commissions that made decisions based upon expert knowledge and impartial judgment. In the 1930s, the imperatives of economic recovery turned the regulatory spotlight away from the independent commission and toward new emergency relief agencies and expanded programs administered by older federal departments such as Agriculture and Interior. Nonetheless, throughout the New Deal period, the public remained interested in independent commissions like the SEC, which were widely viewed as a potential antidote to the stock market scandals of the late 1920s and (to many in Congress) as a bulwark against presidential domination of government. During World War II, as Bernstein describes, the demands of mobilization for war and defense dramatized economic programs and policies outside the scope of the independent commissions, and thereafter the government emphasized promotion of maximum employment, production, and purchasing power in a free-market economy—an effort that still involved and implicated independent regulatory commissions at the time that Bernstein wrote his major work.

Bernstein viewed regulatory reformers, particularly those of the Progressive Era, as simplistic and naive. From his standpoint, "a middle class tradition of genteel reform has resulted in reliance on simple panaceas to achieve far reaching changes."[9] Regulatory reformers "lacked staying power and the ability to maintain the interest of the public in their programs."[10] Moreover, they were "unable to understand the nature of the major problem the commissions had to face—tendencies in Congress to undermine the independence of the commissions."[11]

In particular, Bernstein took issue with the Progressive Era reformers' central belief that administrative regulation requires a high degree of expertness, a mastery of technical detail, and a neutral institutional environment that is entirely free from partisan political considerations. As Bernstein saw it, the expertise of governmental administrators does not give them any special competence to formulate regulatory policy, especially where the problems that face agencies are complex and the scope of agency discretion is great.[12] Expertness does not improve the ability of agencies to plan their activities or to relate to public needs and desires. Instead, Bernstein wrote, it promotes "myopia" in interpreting the

public welfare[13] and creates "a special kind of class system which views public policy through blinders."[14] Similarly, agency independence "does not insure judge-like wisdom, balance and insight."[15] Instead, according to Bernstein, it stands in the way of needed coordination of government policy, and leads to bureaucratic lethargy, lack of imagination, inefficient management, isolation, and insularity.[16]

The reformers' misguided premises led, in turn, to the enactment of inadequate regulatory legislation. In Bernstein's words:

> Regulation often deals with matters about which there is no settled national policy and no stable communal consensus. A regulatory statute more likely than not represents a vaguely worded compromise of conflicting attitudes in Congress as well as the country. It is accepted as a basis for commencing regulation but does not furnish a workable set of goals and policies. . . . No agency finds a regulatory recipe or formula ready-made for its use.[17]

In this legally guideless, unstructured setting, regulatory agencies are subject to persistent challenge and antagonism. Their search for the public interest in regulatory matters "must be carried on against formidable obstacles."[18] They are frequently at the center of a rivalry between Congress and the president to have more influence over their policy making.[19] Moreover, especially in their early years, regulatory agencies are subject to intense pressures from the well-organized interests they regulate.

In a concerted attempt to influence the regulatory process, these individuals and companies often initiate litigation with respect to the legal scope of the agency's regulatory powers and the meaning of its legislative mandates.[20] Bernstein suggested that regulated groups publicly criticize the agency as biased against them and unduly zealous. Those regulated may also resort to "subterfuge, distortion and concealment," and they may "simulate a campaign of propaganda to make the environment of the regulatory agency as hostile as possible."[21]

At the core of Bernstein's concept of the "captive agency" is his discussion of the "life cycle" of regulatory agencies. As Bernstein saw it, the useful lives of these governmental institutions may be divided into four phases: gestation, youth, maturity, and old age. During the gestation phase, public pressure on Congress to produce regulatory legislation gradually mounts. Despite vigorous resistance from opposition groups, the passage of such legislation is finally achieved. However, as

noted above, the statute that is finally enacted is often an ambiguous compromise that fails to provide clear directions to the regulatory agency it establishes.[22]

In its youthful stage, following passage of pertinent regulatory legislation, the agency is endowed with "an aggressive, crusading spirit."[23] It tends to take a broad view of its mission, and it may develop daring and inventiveness in resolving regulatory problems.[24]

Gradually, however, the circumstances of the agency change. Until the courts have outlined the legal scope of the agency's regulatory powers, litigation forms the framework for much of the regulatory process. In addition, open public support for regulation fades away. The agency begins to operate in a technical climate that defies public comprehension. Congress is reluctant to champion public control of business activities without strong, active public support, and public supporters of regulation, tired after their long struggle to pass regulatory legislation, mistakenly tend to regard administration as automatically following legislation.[25]

In this environment, according to Bernstein, the regulatory agency enters a period of "maturity" or "devitalization." It relies more and more upon settled procedures, its goals become routine and accepted, and it slowly becomes primarily concerned with the health of the industry it is charged with regulating. Unable to count on either public or congressional support for firm regulation, the agency grants regulated parties numerous opportunities to challenge its positions and to persuade it that contemplated action is unfair or incorrect. Agency passivity grows until it borders on apathy, and there is an ever-increasing desire to avoid conflicts and enjoy good relationships with regulated groups.[26]

At the close of its maturity phase, the regulatory agency enters a period of "old age" in which it completes its "surrender" to the groups it is nominally regulating. As Bernstein described it:

> Politically isolated, lacking a firm basis in public support, lethargic in attitude and approach, unsupported in its demands for more staff and money, the commission finally becomes a captive of the regulated groups. During old age, the working agreement that a commission reaches with regulated interests becomes so fixed that the agency has no creative force left to mobilize against the regulated groups. Its primary mission is the maintenance of the status quo in the regulated industry, and its own position as recognized protector of the industry. . . . In their declining days, commissions can be described as retrogressive, lethargic,

> sluggish and insensitive to their wider political and social setting. They are incapable of securing progressive revision of regulatory policies and fall further behind in their work.[27]

In Bernstein's opinion, the length of each life cycle phase varies from one regulatory agency to another, and some agencies may skip an entire period as they evolve.[28] However, in his view, the best antidote to agency capture is a strong and continuing internal sense of agency mission,[29] combined with astute agency leadership actively engaged in seeking political support from the president, Congress and the public at large.[30] Thus, for Bernstein,

> the area of [regulatory agency] freedom from the standards of private parties depends heavily on the prestige and competence of the regulatory officials, the prevailing political temper of the times, the capacity of the agency to find support in the presidency and Congress, the vitality of public opinion in favor of regulation and the [political] strength of the private parties themselves.[31]

The eighth chapter of *Regulating Business by Independent Commission* contains Marver Bernstein's thoughts with respect to regulatory enforcement. Bernstein envisioned enforcement as a vital component of regulatory work. He observed that "[o]ne of the crucial tests of the effectiveness of a regulatory commission is its capacity to obtain the compliance of persons subject to regulation and to enforce its regulations against violators."[32] Moreover, Bernstein observed that:

> [t]he attitude of a commission towards its enforcement responsibilities affects its entire regulatory program. Unless it demonstrates a capacity to enforce its regulations, they will be honored more in the breach than in the observance. Those (regulated firms) who discover that violations go undetected and unpunished will have little respect for the commission and will violate regulations with impunity if it is to their financial or commercial advantage.[33]

The more passive a regulatory agency is, the less likely it is to organize effective compliance and enforcement activities. Conversely, the absence of vigorous enforcement typically reflects an agency's lack of active regulation in the public interest.[34]

Bernstein saw eight elements as being crucial to the establishment and

maintenance of effective regulatory enforcement. First and foremost, the regulatory agency must have broad public support for the goals of the regulation and the agency's general regulatory policies.[35] Second, the agency's regulations themselves must be drafted so as to be understandable to all regulated parties,[36] and they must be enforceable in the sense that violations can be readily detected and proven by the agency's staff.[37] Third, the inspection and enforcement work of an agency should be implemented by a separate, designated unit of the agency that has no other program responsibilities.[38] Fourth, when participating in litigation involving or affecting enforcement, a regulatory agency must have access to a judiciary "sympathetic to the broad purpose and goals of the statute and regulations that have been violated."[39] Fifth, where regulating enforcement is undertaken, the level of sanctions and penalties assessed should be commensurate with the type of violation that is the basis for the enforcement action.[40] Sixth, effective enforcement requires the close cooperation of investigators, attorneys, and other personnel trained in different disciplines.[41] Seventh, Bernstein recommended that regulatory agencies issue explanatory materials describing their regulations and explaining how they might be complied with, in order to promote regulatory compliance.[42] Finally, Bernstein suggested that government agencies take advantage of the importance of government as a source of credit, as a source of supply, and/or as a consumer, to help create additional incentives for regulated parties to comply with applicable standards.[43]

These enforcement and compliance elements are not present in most regulatory agencies, according to Bernstein. Thus, he concluded his observations on regulatory enforcement with the pejorative comment that

> [e]nforcement activities of the regulatory commissions tend to be weak, poorly staffed and inadequately supported. They are marked by overall inadequacy and reluctance to experiment with new enforcement techniques. Incentives to induce compliance are rarely articulated, and deliberate planning of compliance programs is conspicuously absent.[44]

Although well received by other scholars of regulation, it took some time for Marver Bernstein's work to result in changes in government policies. Gradually, however, the findings and suggestions of Bernstein (and captive agency theorists like him) proved immensely influential with respect to the ways in which regulation by administrative agencies was authorized by Congress, implemented by the agencies themselves, and reviewed by federal courts. Particularly in the late 1960s and early 1970s,

in response to the criticisms that Bernstein and his colleagues initiated, Congress enacted a series of new regulatory statutes that were longer, more detailed, and more specifically directive toward regulatory agencies than had been true in the past. For the first time, these statutes encouraged citizen participation in agency decision making, direct citizen involvement in regulatory enforcement, and greater openness and accountability in the work of administrative agencies. Additionally, the federal courts began to scrutinize more carefully the administrative procedures adopted by agency administrators, together with the reasoning those administrators relied on to support their regulatory decisions.

One type of regulatory legislation enacted in response to the captive agency theory of Bernstein and his fellow theorists has been termed the "coercive model" of regulatory delegation. In a perceptive article,[45] professors Sidney Shapiro and Robert Glicksman describe the coercive model in these terms:

> Congress mandates agency regulation by removing an agency's discretion to regulate, but permits the agency to choose the appropriate model of regulation. . . . This model typically forces the agency to regulate by mandating some kind of agency action—such as listing chemicals as hazardous or issuing regulations applicable to industrial polluters—before a set deadline. The substantive delegation, however, is couched in general terms.[46]

Shapiro and Glicksman also posit a "ministerial model" of congressional control. Under the latter approach, Congress includes in a regulatory statute both a set of detailed regulatory criteria that the administrative agency is required to follow in establishing regulations and a binding set of deadlines by which it must act.[47]

In their analysis of federal pollution control legislation, Shapiro and Glicksman aptly note that not all statutory prescriptions to EPA fit squarely into the models of control of regulatory agencies that their work describes.[48] Nonetheless, many sets of amendments to EPA-authorizing statutes enacted in the late 1970s and 1980s clearly exemplify coercive control legislation that attempts to accelerate the pace of regulation (and facilitate legislative oversight) by forcing the EPA to make particular regulatory decisions within a specified time.[49] Other environmental regulatory statutes supplement mandatory deadlines with specific regulatory criteria that bind EPA in its rule making.[50] Both species of this legislation are responsive to the concerns of Bernstein and others that regulatory

legislation not endow agencies with unfettered discretion to regulate as they see fit.

Beyond this, as mentioned above, much of the federal environmental regulatory legislation enacted since the late 1960s reflects captive agency theory in another significant respect: it includes specific provisions intended to open up the regulatory process to participation by members of the public at large. One example of such a provision is the statutory authorization of private petitions for initiation of rule making proceedings and other agency actions. Typically, such petition sections allow for judicial review of all agency decisions that deny citizen petitions.[51]

Other common provisions of federal environmental statutes permit private citizens to initiate lawsuits to enforce certain requirements imposed in other portions of the same legislation. The "citizen suit provisions" generally authorize individuals to act as "private attorneys general" by instituting civil enforcement in federal district court against any person who is violating an applicable substantive requirement of the statute (or an EPA regulation promulgated thereunder). Additionally, they entitle citizens to bring civil actions to compel the EPA administrator to carry out nondiscretionary requirements of the statute.[52]

The influence of captive agency theory on regulatory policy was not limited to the regulatory enactments of Congress, however. As Thomas Merrill perceived:

> [C]apture theory also suggests that aggressive judicial oversight and control of agencies is needed in order to counteract the distortions of the administrative process introduced by interest group capture and other pathologies. Specifically, by forcing agencies to adopt an administrative process that is more open, and to give greater consideration to underrepresented viewpoints in that process, courts may be able to counteract the distortions emphasized by the theory.[53]

The judicial responses to the concerns embodied in the writing of Bernstein and other proponents of the captive agency theory were effectively catalogued—and then criticized—in an important law review article by Richard Stewart, "The Reformation of American Administrative Law."[54] Stewart observed that judicial skepticism regarding the efficacy and fairness of administrative agency regulation had led the courts to abandon a more restrained traditional model of judicial review in favor of what he termed a "fundamental transformation" of American administrative law.[55] As Stewart saw it, that transformation, which took place

in the late 1960s and early 1970s, had three significant aspects. First, the courts substantially eliminated the doctrine of standing to sue as a barrier to challenging agency action in court.[56] Second, the courts granted individuals broad permission to intervene in proceedings pending before regulatory agencies.[57] Finally, in reviewing regulatory agency decisions, federal judges imposed on administrators a duty to consider, fully and adequately, the views of all participating interests in decisions regarding agency rules and policies.[58]

How accurately does the captive agency theory enunciated by Marver Bernstein describe the circumstances of EPA's enforcement programs? Did the governmental responses to that theory, described above, succeed in resolving the problems that Bernstein identified?

In a 1991 law review essay,[59] Howard Latin stated:

> I have found little evidence that EPA and other agencies are "captured" by regulated interests as a result of bribes or career opportunities for bureaucrats who adopt pro-industry practices. More subtle influences, however, often do condition the behavior of administrators in favor of regulated interests. . . . 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.[60]

Latin concluded that, to the extent that agency capture does take place, it is a result of eight "laws" of administrative behavior that he sets forth in his article.[61]

Mark Seidenfeld reached conclusions substantially similar to those of Latin. As Seidenfeld saw it:

> Although evidence suggests that traditional capture mechanisms are not a pervasive problem today, that does not mean that domination is not a potential threat or that particular interest groups no longer exert undue influence on agency decisionmaking.[62]

Seidenfeld noted that firms in regulated industries and interest groups with strong central staffs continue to occupy "a favored position" in regu-

latory and political structures, a position that grants them "an advantage in influencing Agency decisions."[63] Such industries and groups have the incentive and means to monitor what EPA does on a day-to-day basis. They also have information that the Agency requires to do its job.[64]

Dan Esty expressed agreement with Howard Latin's point with respect to asymmetries of political involvement between regulated industrial interests and environmentally concerned citizens. Esty adroitly observed:

> [T]he complexity and opacity of many environmental issues and the public's difficulty in perceiving its own interest make the risk of special interest manipulation much more severe in the environmental realm than in other fields of regulation or government activity. Simply put, the average citizen knows if he or she is getting adequate roads or schools and even has a sense of whether the government regulation of banks seems appropriate. In many environmental circumstances, however, no comparable basis for judging the adequacy of outcomes exists. . . . In this nontransparent world, the threats of special interest manipulation and public choice failures are very real and also very large.[65]

Matthew Zinn wrote that environmental regulation is "not immune from capture,"[66] and that "the risks of capture of environmental regulation in general are mixed."[67] At the same time, however, Zinn found that environmental enforcement "appears uniquely susceptible to influence by regulated entities."[68] He explained:

> An agency's choices about monitoring, whether or not to bring an enforcement action, and the type of enforcement action to bring, lack the regularity and transparency of rulemaking. Much more so than policy development, enforcement activity is insulated from the close scrutiny of pro-regulatory interests, of Congress, and of the general public. It also calls for closer interaction between regulators and individual firms. This confluence of obscurity and familiarity allows agencies and regulated firms to move closer together.[69]

Finally, citing the work of others, Clifford Rechtschaffen noted both the general dangers of special interest ascendancy in environmental law and the susceptibility of environmental regulatory enforcement personnel to special interest influence.[70] Rechtschaffen rejected a proposal by Shapiro and Glicksman that administrative agencies use their enforcement discretion to adjust general regulatory commitments in specific cir-

cumstances in order to accommodate unique or anomalous situations. In doing so, he pointed out that "providing regulators with additional enforcement discretion could exacerbate the already-existing tendency toward special interest influence or domination."[71]

In the remainder of this section of this chapter, I will examine how Bernstein's notions of agency capture have or have not been borne out in the EPA's enforcement record. Before that, however, some words of caution and qualification seem in order. First, while instructive and (I hope) provocative, this chapter's assessment of the captive agency approach through the lens of EPA enforcement may not present a complete and definitive test of the descriptive and predictive value of that theoretical approach. EPA is, after all, only one of many federal regulatory agencies. This chapter does not attempt to evaluate the regulatory work of any other federal agencies, nor does it consider state or local regulatory activity in any comprehensive or systematic way. The conclusions I will reach are thus limited to that extent and more research on this area, focusing on other agencies than EPA, will surely be beneficial.

Second, in emphasizing EPA enforcement, I consider the regulatory policymaking activities of EPA only at the margins. While I have no basis for criticizing Bernstein's assertion that "the lack of a vigorous [enforcement and] compliance program probably reflects the lack of vigorous regulation in the public interest,"[72] the data on which my assessment of his work will be based will not be extensive enough to either prove or negate that observation.

Third, in *Industry Influence in Federal Regulatory Agencies*, Paul J. Quirk aptly wrote that "[j]udging the validity of [accusations of capture] can become quite complex and uncertain. [A]n allegation of industry influence usually rests on an (often unstated) assumption about what the agency would have done in the absence of industry influence—an assumption that tends to derive from what the critic thinks should have been done."[73] In this analysis, I have made an effort to separate my own personal preferences about the past direction of the EPA's implementation of environmental legislation from objective observations regarding what the Agency has actually done—and how its actions do or do not coincide with Marver Bernstein's captive agency notions (along with other aspects of his writings). Nonetheless, Quirk's overall point is well taken. To the extent that my analysis simply reflects my own policy biases, my own conclusions may be fairly questioned.

Finally, one further caveat: Bernstein obviously could not predict the future nor could he have been expected to. In particular, Bernstein can-

not be faulted for failing to anticipate the extraordinary success of his own work in influencing Congress and the federal courts. Nor can he be justly criticized for not predicting the future existence of agencies like the EPA, which regulate the practices of a very broad range of U.S. industries (as well as many municipalities and, at times, all members of the public). Moreover, Bernstein can scarcely have prognosticated the myriad profound changes in American society—and political culture—that have occurred since *Regulating Business by Independent Commission* appeared in 1955. In reviewing his work of fifty years ago, I have attempted to keep those precepts in mind.

That being said, let us move to Bernstein's capture theory, beginning with his pronouncement that regulatory agencies must operate in a constant atmosphere of antagonism and challenge. Does EPA's enforcement experience support that finding? The answer is an emphatic yes. As we have noted, the enforcement process is indeed highly demanding and contentious. EPA's conduct of enforcement has certainly been subject to vigorous criticism from a variety of quarters. In the late 1970s, for example, EPA's new policy of "file first, negotiate later" led to a marked increase in industry resentment of the Agency. EPA's managers and staff were publicly criticized at that time—and subsequently—as antibusiness zealots and ineffective bureaucrats.[74] EPA's enforcement work was also subject to periodic, harsh criticism from Capitol Hill,[75] state officials,[76] and (in intra-governmental internal disputes) from the Department of Justice, the Department of Energy, and other agencies and departments. Moreover, EPA has experienced repeated budgetary shortfalls that have detracted from the effectiveness of its enforcement efforts.

Bernstein wrote that, particularly in the early stages of an agency's implementation of regulatory legislation, regulated parties often resort to litigation to gain favorable judicial interpretations of the statutes themselves. This has certainly been true in the EPA's case. In many instances, regulated industries or trade associations have taken advantage of the preenforcement review provisions included in most federal environmental legislation to file lawsuits challenging the stringency or affordability of regulations promulgated by the EPA. In addition to giving EPA's industrial critics the prospect of having to comply with requirements that they find more acceptable, these suits also benefit their proponents by delaying the enforceability of the regulatory standards being challenged until judicial review of them has been completed.

Bernstein mentioned that industrial opponents of regulation might resort to subterfuge and propaganda in order to gain public support for

their political positions. This has been true with regard to the EPA as well. Beginning with the "jobs versus environment" controversy that emerged in the Ford and Carter administrations, various regulated industries have engaged in overdrawn, orchestrated media campaigns to convince the public that EPA and its fellow regulatory agencies were obtuse, dictatorial, unreasonable, and a drag on national economic prosperity.

Notably, public issue advertising by U.S. industries is anything but a new phenomenon. As political science professor Tom Konda wrote in 1993, in a letter to the editor of the *New York Times* regarding a *Times* article on television campaign ads against the early Clinton administration health-care plan:

> The idea that only "rarely" and on a few issues has industry used advertising to sway public opinion on policy issues is dead wrong. Issue advertising is not new. It was not new 10 years ago, when the nuclear power industry initiated a $30 million television ad campaign as part of its lobbying efforts. Only 20 years ago . . . Russell Train, EPA director, attacked "a well organized campaign . . . to propagandize the public into believing that our environmental concerns have been overstated."
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> Issue advertising was not even new in 1950, when the American Medical Association fought President Harry Truman's health care plan with advertising in 10,000 newspapers, 30 national magazines and 1,000 radio stations. Or in 1936, when "The Ford Sunday Evening Hour" of orchestral music devoted its commercial time to "talks" excoriating New Deal policies such as Social Security. Or even when President Woodrow Wilson complained that the "newspapers are being filled with advertisements calculated to mislead the judgment not only of public men, but also the public opinion of the country itself."
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> Eighty years ago, when Senator Charles Thomas denounced the sugar lobby's advertising during a tariff battle, issue advertising was new. Since then, business has repeatedly turned to advertising to sell its policy views to the public.[77]

Despite its lack of originality, however, inaccurate industry advertisements castigating government regulation in general (and EPA implementation of environmental laws in particular) are certainly an unfortunate fact of life for EPA and its public supporters.

Marver Bernstein also posited a "life cycle" for regulatory agencies in which they pass through four distinct stages—gestation, youth, maturity, and old age—while becoming ever-increasingly dominated by the

industries they have been asked to regulate. How close of a fit is there between this key aspect of Bernstein's theory and EPA's regulatory enforcement experience? Here the evidence appears ambiguous. As to most of the environmental legislation that EPA became responsible for implementing, the Agency did indeed pass through a "gestation period" in the early 1970s as Congress debated and ultimately enacted the Clean Air Act, Clean Water Act, Federal Insecticide, Fungicide and Rodenticide Act, and a number of other environmental regulatory statutes. Moreover, EPA seems to have experienced the "youthful phase" that Bernstein wrote of at least twice in its enforcement history. In its first two years of existence, EPA took vigorous steps to enforce then-existing environmental laws against various Fortune 500 corporations under the Refuse Act and other federal laws. Acting out of a strong sense of mission, the young Agency enjoyed strong public support for its work in that period. Similarly, EPA's pre-Superfund hazardous waste enforcement under 7003 of the Resource Conservation and Recovery Act, as carried out by the Agency's short-lived Hazardous Waste Enforcement Task Force,[78] also exemplified the sort of idealistic, highly motivated regulatory programs that, according to Bernstein, typify regulatory agencies in their early days. However, since that time, how far the EPA has moved into what Bernstein described as "maturity," and whether or to what extent it has been captivated by industry groups in an "old age" phase, are more difficult questions.

Undoubtedly, in Bernstein's terms, the Agency is no longer youthful. Since the early 1970s, EPA has relied more and more on settled procedures (in its enforcement activities and elsewhere). Moreover, its goals also seem to have become more routine and accepted. It is much more questionable, however, whether EPA has consistently manifested the "passivity that borders on apathy" which Bernstein referred to as "the most marked development" in a mature regulatory entity.[79] And only occasionally and temporarily has EPA manifested the complete debility that Bernstein considers characteristic of a captive agency that has reached "old age." A more accurate conclusion appears to be that EPA is an agency that has only partially matured, and is still vulnerable to further decline and industry captivity.

Over the years of its existence, EPA enforcement work has, at the very least, bordered on captivity at several points. For example, during the tenure of Anne Gorsuch as EPA administrator, in the opening years of the Reagan administration, the Agency narrowly survived an attempt by its own political leaders to dismantle the Agency's enforcement programs. In the face of determined congressional opposition, that misguided attempt

at agency capture failed. Had it succeeded, however, that anti-regulatory initiative would have gone far in the direction of rendering EPA the toothless, ineffectual bureaucracy that Bernstein's theoretical "maturity" and "old age" phases so vividly describe.

Industrial capture of EPA might also have occurred if in 1992, during the late Bush I administration, the vice president's Council on Competitiveness had made more headway in forcing the Agency to relax environmental requirements, or if the Clinton administration, in 1993, had tilted further than it did in the direction of regulatory reform and compliance assistance as a substitute for an assertive, deterrent enforcement program.

In 1995, after a bitter political struggle, the EPA succeeded in defeating an effort by the newly elected, anti-regulatory "Gingrich Congress" to slash drastically the Agency's budget for enforcement and other important functions. Had those budget cuts become effective, they would undoubtedly have disabled the EPA's ability to regulate industry effectively. In addition, during the Bush II administration, a political decision to use regulatory interpretations to undermine EPA's massive, ongoing enforcement initiative against the electric utility industry appears to have brought about at least a partial capture of the Agency's enforcement work, by a politically influential industry that successfully gained support for its anti-regulatory positions from key political figures within the EPA and other parts of the executive branch.

These examples of near and partial EPA capture notwithstanding, however, throughout most of its history the Agency does appear to have maintained at least a measure of independence and a reasonably progressive outlook on the appropriate role of environmental regulation and regulatory enforcement. Additionally, EPA has displayed little of the extreme passivity—and entrenched resistance to change and innovation—that Bernstein described as exemplifying regulatory agency maturity and old age.

In the enforcement area, the Agency's record contains several examples of innovation and a willingness to walk along fresh paths to encourage regulatory compliance. These include EPA's adoption of a multimedia enforcement approach, the "enforcement in the 1990s" reforms championed by then–Assistant Administrator Jim Strock, and the EPA enforcement innovations of the Clinton period (including targeted national enforcement initiatives, letters to regulated companies inviting voluntary corrections of known violations, and publicizing enforcement objectives).

Overall, then, the key trends and events in EPA's enforcement history do appear to support the conclusions of Matthew Zinn, Clifford Recht-

schaffen, Mark Seidenfeld, and Daniel Esty that EPA is not immune from regulatory capture, and that its enforcement program is uniquely susceptible to influence by regulated parties. The Agency does indeed work in an atmosphere of antagonism and challenge, and most of the criticism it encounters comes from regulated entities and their allies in Congress and the executive branch—opponents much better situated than the EPA and its political allies to use public advertising, sometimes in disingenuous ways, to influence public opinion in their favor.

As we have seen, at several points in the Agency's history, the viability of EPA's enforcement work has been greatly threatened by its industry critics. Moreover, with regard to new source review of power plants, some of those regulated parties did succeed in halting a high-priority, resource-intensive EPA enforcement initiative during the Bush II administration. Nonetheless, despite those notable near misses and the partial capture, EPA's enforcement programs thus far appear to have avoided complete capture at the hands of the very industries whose governmental impacts the Agency regulates. Whether that pattern will continue remains an open question.

If EPA has not followed key aspects of the captive agency model spelled out by Bernstein, it seems fair to inquire why not? Why (at least thus far in its history) has the EPA not become a consistently and completely dysfunctional, reactionary captive of the industries it has been charged with regulating? The happy coincidence of several independent factors seems to supply at least a tentative answer.

First, EPA was fortunate to enjoy strong political support from the president at a time—during the challenge of the Gingrich Congress to the Agency's integrity—that such support was desperately needed. Conversely, when EPA's enforcement work was obstructed by an administration with strong anti-regulatory preferences early in the Reagan administration, the Agency had the good luck to be defended skillfully and resolutely by influential, politically sophisticated leaders in Congress.

Second, throughout its history, EPA has maintained at least some support from organized, politically active environmental groups. Those public interest groups did not exist when Marver Bernstein first posited the captive agency theory in the mid-1950s. Notwithstanding the political "asymmetries" that Esty, Latin, and Seidenfeld aptly noted, the work of these groups appears to have succeeded, at least in part, in helping the EPA avoid the complete political isolation—i.e., the absence of a base of regular political support—that Bernstein described with respect to the small, regulatory commissions which preceded EPA's existence.

Third, throughout its history, EPA has been blessed with a highly motivated, dedicated, mission-oriented professional staff. Although the permanent staff's collective preferences were not always heeded, the Agency's staff clearly did serve at times as an anchor of stability in a sea of political turmoil.

Fourth, at least for the most part, EPA's appointed leadership has been neither as uninspiring nor as mediocre as the regulatory commissioners whom Bernstein criticized, nor have those leaders been as politically naive and uninvolved. Concededly, the EPA has had its share of weak (and even destructive) leadership—particularly during the early Reagan administration. Nonetheless, the Agency has also been fortunate to have been led for lengthy periods by such able administrators as Bill Ruckelshaus, Russell Train, Douglas Costle, Bill Reilly, and Carol Browner. All of those top EPA leaders were savvy, decent, and institutionally loyal individuals. They understood the U.S. political system and were able to find and maintain political support for EPA, both in the executive and legislative branches and among the public at large, when that support was critical to the Agency's autonomy and integrity.

Finally, EPA's failure to follow the pessimistic pattern described by Bernstein and other capture theorists must be credited, in no small measure, to the success of Bernstein's own scholarly work. As we have seen, in the 1960s and 1970s, captive agency theory was widely respected in both Congress and the federal courts. As a result, in fashioning environmental statutes, Congress was highly receptive to the recommendations of captive theorists that agencies like the EPA have a single administrative head and that it have numerous industries as its regulatory "clients." Congress also saw to it that the Agency's decision making did not result primarily from a sterile process of administrative adjudication, and that environmental regulatory legislation did not grant EPA the unlimited discretion to set and alter its own regulatory agenda. In EPA's case, these congressional decisions—all traceable to the writings of Marver Bernstein and other captive agency theorists—have played no small part in preventing the traditional forms of regulatory agency captive by industry that those theorists so passionately decried.

If EPA has not—at least not yet—been a captive agency (at least in the way that Bernstein defined that term) to what extent do Bernstein's notions, preferences, and predilections as to regulatory enforcement itself jibe with the realities of the Agency's stormy, uneven enforcement history? In fact, as this brief overview will illustrate, with few exceptions

Bernstein's observations on regulatory enforcement have proven to be sensible and remarkably prescient.

As I have noted, Bernstein viewed it as essential that regulatory agencies have broad public support for their goals and policies. For the most part, EPA has enjoyed such support. As mentioned above, a number of its administrators have skillfully garnered public sympathy for the Agency's efforts, including its enforcement programs. At critical times, the Agency has also received key assistance from allies in Congress, the executive branch, and environmental organizations.

Bernstein also stressed the importance of the comprehensibility and enforceability of regulatory requirements. His point was well taken and widely acknowledged. Nonetheless, in that regard, EPA's record appears mixed. For example, the first set of Clean Air Act state implementation plans (SIPs), drafted by the states and hastily approved by the Agency, were very general in nature and lacking in meaningful reference to the kinds of industrial facilities they ostensibly controlled. As a result, once the early SIPs became enforceable, EPA was forced to devote a good deal of time and effort to determining how to apply these requirements to specific pollution sources. Non-enforceability problems have also arisen under the maximum achievable control technology (MACT) standards established by EPA to control the emission of toxic air pollutants. In the enforcement process, those regulations have proven opaque, enormously complex, and immensely difficult to administer.

Bernstein soundly recommended that the enforcement work of regulatory agencies be implemented by a separate, designated agency unit. EPA's record in this area has been uneven. In 1981, EPA Administrator Anne Gorsuch abolished such a separate unit in EPA headquarters (the Office of Enforcement) and divided its legal and technical personnel into separate organizational units. Although the Agency's enforcement efforts underwent a formal reorganization in 1990, those changes failed to overcome the continuing fragmentation of EPA enforcement authority. Only in 1993 and 1994 did the EPA again reorganize its headquarters to create a new, expanded Office of Enforcement and Compliance Assurance (OECA). That massive change once again brought the Agency's enforcement attorneys and technical staff at headquarters into the same headquarters organizational unit—a beneficial shift in the long term.

Bernstein noted the importance for regulatory agency enforcement of having access to a generally sympathetic judiciary. In that respect, EPA has been fortunate. Together with the Department of Justice—which

represents the Agency in the federal courts—EPA has compiled a reasonably successful record in its judicial enforcement cases. EPA's (and the DOJ's) most striking and notable achievement, perhaps, came in the early 1980s when the federal government won a series of key cases under the Superfund statute that established the principle of strict, joint, and several liability, and various other doctrines that gave the government considerable authority to enforce the statute against potentially responsible parties (PRPs) at hazardous waste sites.

Bernstein sensibly recommended that the level of sanctions and penalties assessed be commensurate with regulatory violations being redressed. At least in its formal enforcement policy pronouncements, EPA has attempted to do precisely that. The Agency's RCRA penalty policy, for example, attempts to distinguish among more serious and less serious violations, and to assess penalties against violators that are appropriate to their offenses.

Bernstein suggested that regulatory enforcement be characterized by cooperation between attorneys and technically trained personnel. Although it is difficult to draw definite conclusions regarding EPA's performance in this area, the best evidence seems to be that the Agency has done reasonably well in that respect. Interdisciplinary disputes among the staff have arisen on occasion. Nonetheless, for the most part since the 1970s, EPA's enforcement attorneys and technical staff appear to have worked together efficiently and harmoniously toward shared goals.

Bernstein also recommended that government agencies promote regulatory compliance by issuing explanatory materials describing their regulations and appropriate ways of complying with them. EPA has done relatively little in this regard, with one notable exception. Beginning in the Clinton administration, EPA did make a conscious, sustained effort to provide "compliance assistance" to regulated industries. While likely beneficial, however, this compliance assistance program had the initial, unwanted result of creating confusion and misunderstanding among the EPA's permanent career enforcement staff as to whether traditional Agency enforcement approaches were still in favor with EPA's top managers.

Finally, Bernstein urged that government agencies promote regulatory compliance by taking advantage of the importance of the federal government as a creditor, supplier, and consumer. Congress accepted this notion by including provisions in the Clean Water Act and Clean Air Act that prohibit criminal violators of those statutes from doing business with the government unless and until those parties have brought their offend-

ing facilities into compliance with applicable regulatory standards.[80] EPA has dutifully implemented those provisions. They have proven effective in enforcement cases, however, only as to the relatively small minority of environmental polluters who do most or all of their business with federal agencies and departments.

In sum, Marver Bernstein's *Regulating Business by Independent Commission* presented an informed, thoughtful, and vigorous critique of business regulation in the United States at the time it was written. His volume gave impetus to a highly influential movement to alter the ways in which regulatory agencies are legally authorized and politically controlled. This chapter has shown that, despite the passage of more than half a century, many of Bernstein's notions regarding regulation of business and the enforcement of regulatory requirements still ring true.

Ironically, what I have just asserted seems to be *least* true regarding the part of Bernstein's work for which he is best known: his ideas regarding the life cycle of administrative agencies. My review of highlights from the EPA's enforcement history has suggested that for the most part EPA has only partially matured (to use Bernstein's term), and that the Agency has successfully managed to avoid the complete domination by regulated industry that Bernstein posited. In part, this salutary situation may be a result of the success of Bernstein, other captive agency theorists, and their political allies, in convincing Congress to reform regulatory legislation in ways that they favored.

Nonetheless, EPA's record also has a bleaker side. It suggests that EPA's enforcement work has been nearly captured by industry several times and that it was partially captured on one occasion. The political mechanisms by which this industrial domination occurred—through policy initiatives of two presidents and a Congress highly sympathetic to industries regulated by the EPA—were different from those that Bernstein predicted. Nonetheless, the record makes clear that in some political settings EPA—and its enforcement program—is distressingly vulnerable to the industry capture that Bernstein's writing described and protested against. Indeed, the Agency's enforcement efficacy and integrity seem anything but assured. In view of the immense practical significance of EPA enforcement as a means of redressing and preventing environmental lawlessness and pollution, their protection must remain a continuing priority for concerned citizens, environmental organizations, Congress, and the general public.