

TESTIMONY
OF
LISA HEINZERLING

JUSTICE WILLIAM J. BRENNAN, JR., PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

HEARING ON
A GROWTH AGENDA:
REDUCING UNNECESSARY REGULATORY BURDENS

FEBRUARY 1, 2017

Mr. Chairman and Members of the Committee, thank you for giving me the opportunity to testify before you today.

I am the Justice William J. Brennan, Jr., Professor of Law at the Georgetown University Law Center. My primary expertise is in administrative law and environmental law. My work in these fields includes four books and dozens of law review articles and book chapters. From January 2009 to December 2010, I took a leave of absence from Georgetown to serve first as Senior Climate Policy Counsel and then as head of the Office of Policy at the U.S. Environmental Protection Agency. I am a member scholar of the Center for Progressive Reform, a public member of the Administrative Conference of the United States, and the chair of the board of directors of the Center for Science in the Public Interest.

I. Introduction

No one in the public debate over the proper role of regulation in our society has argued in favor of a stagnant economy or "unnecessary regulatory burdens." Reasonable people can disagree about the appropriate scope, shape, and pace of regulation, and a debate on these issues is healthy. Unfortunately, however, the debate over regulation is often not framed in a reasonable or even honest way. All too often, in fact, the debate recklessly ignores the many benefits of regulation and inaccurately reports its costs. And all too often, the debate skips over the fundamental reasons why we turn to regulation in the first place. At such a moment, it is worthwhile to return to first principles: why do we regulate? My remarks begin with a review of the purposes and benefits of regulation and then turn to prominent examples of dissembling on the matter of regulatory costs. I conclude with observations about the regulatory process itself.

II. The Benefits of Regulation¹

It is hard to improve upon James Madison's reminder about why we have both government and constraints on government: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."² Yet recent debates over the scope and shape of the regulatory state have fixed on the second insight in Madison's famous passage while ignoring the first. Proposals to rein in administrative agencies – to slash their budgets, veto their rules, undo their legal authority, hamstring them with multiple new procedural requirements – are offered as though rules governing human behavior produce all costs and no gains. They

¹ The discussion in this section draws heavily on an Issue Brief I wrote in November 2011 for the American Constitution Society; this Issue Brief is available at https://www.acslaw.org/sites/default/files/Heinzerling_-_Missing_a_Teachable_Moment.pdf.

² The Federalist No. 51 (1787).

proceed as if people will not hurt other people if government steps aside. People are angels, in other words, outside of government; they mostly just go about their business, not trying to hurt anybody. We gain nothing by constraining their behavior.

Lost in this rosy vision are three simple facts.

First, people are not angels. It is not just that people can be cruel and vindictive. It is also that they can be greedy, selfish, careless, and callous. Even when they do not set out to harm other people, they can end up doing so through greed and neglect. The financiers who helped bring the U.S. economy to its knees did not mean to hurt anyone; U.S. utilities would surely prefer that the pollution from their power plants did not kill thousands every year; the makers of small spherical magnets surely do not desire that children swallow them and suffer horrific internal injuries. A great deal of human suffering, in fact, has nothing to do with maliciousness and everything to do with avarice and indifference. But pursuing profit in the face of a known risk to others is not angelic.

Recent history gives us examples, moreover, of corporations and corporate officials deliberately choosing to pursue profits at the expense of the public good. Corporate officials who worked for the auto parts maker Takata have been criminally charged with fabricating safety test data to cover up a lethal defect in the airbags made by the company. Takata itself has paid \$1 billion in fines and restitution arising out of these actions. The automaker Volkswagen will pay over \$4 billion in criminal and civil penalties after pleading guilty to installing software in its vehicles in order to cheat federal pollution limits for motor vehicles. Volkswagen executives have also been criminally charged. These events should give pause to anyone tempted to argue that we should leave public protection up to corporations and their executives.

Second, given that people are not angels, a basic purpose of government is to protect people from being hurt by other people. And, far from illegitimately constraining freedom, law actually promotes freedom when it protects people from being hurt by other people. As John Locke – whose views on the purposes of government greatly influenced this country’s founding generation – put it: “Where there is no law, there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law.” Discussants in current debates over the regulatory state seem to forget that “regulation” is just another word for “law,” and that law is a predicate for human freedom.

Third, protecting people from being hurt by other people is also the predominant purpose of the kinds of regulation now subject to some of the most vociferous attacks – consumer, health, safety, and environmental regulation. Consider the example of the Clean Air Act, one of the most embattled sources of regulatory authority in government today. The terms “public health” and “public welfare” appear like mantras throughout the Act; at its core, the Act aims to protect

people from dying or falling ill, or suffering other, welfare-based harms such as damage to water, soils, crops, and wildlife, due to air pollution. What is more, by targeting specific sources of pollution and by generally requiring that these sources do their level best to control their pollution, the Act aims to prevent the people in charge of these sources – the ones who choose and control the mechanisms of pollution – from hurting other people. Seen in this light, the Clean Air Act and other like modern laws follow in a direct line from the framers and their ambitions for government, by constraining human behavior in a way that promotes human freedom. Yet the Clean Air Act is one of the laws often held up as an example of the kind of regulation we would be better off without – even though careful retrospective studies of the costs and benefits of regulations issued under the Act have repeatedly shown that the Act returns up to 90 times more in quantified benefits than it imposes in costs.³

In explaining why we regulate and what regulation does for us, it is also important to describe the exact harms that will befall people if we do not regulate. That is, in addition to discussing the human role in creating these harms, we should also identify the harms themselves.

These harms are many and varied.

One category of harms avoided through regulatory intervention is an especially clear-cut counterpoint to the economic costs of regulation: sometimes, consumers and others directly lose money in the absence of regulation. Or, put another way, regulation sometimes *saves people money*. Fuel economy standards for motor vehicles save consumers thousands of dollars in gasoline costs over the life of their vehicles.⁴ When the Federal Trade Commission sued a marketer of dietary supplements for offering “free trials” of dietary supplements that came paired with recurring charges that were very difficult to avoid, it took aim at a problem that cost consumers over \$30 million in one year alone; and this is just one of some 60 like cases brought by the FTC in the last decade.⁵ Likewise, when the FTC cracked down on companies making false promises of employment and business success to people who were unemployed or otherwise falling behind in the economic downturn, it sought to control practices that also cost consumers tens of millions of dollars; the agency charged that one company alone had bilked consumers out of \$40 million.⁶ Rules issued in the last 20 or so years by the Department of Energy, setting

³ EPA, The Benefits and Costs of the Clean Air Act from 1990 to 2020 (2011), available at <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study>.

⁴ See, e.g., Consumers Union, Consumer Savings from 2025 Corporate Average Fuel Economy Standards (CAFE) (2016), available at <http://consumersunion.org/research/cale-2025-consumer-savings/>.

⁵ FTC news release, available at <http://www.ftc.gov/opa/2010/08/acaicolon.shtm>.

⁶ FTC news release, available at <http://www.ftc.gov/opa/2011/03/emptypromises.shtm>.

efficiency standards for household appliances, will have saved consumers over \$100 billion by 2030. Far from taking money out of consumers' pockets, these kinds of legal efforts put money back in them – or make sure it doesn't leave in the first place.

Regulation can also save people money more indirectly. When a person does not have to go to the hospital because a rule has reduced the air pollution that would have made her sick, or when she does not miss work for the same reason, the rule has saved her the expense of a hospital visit or wages lost due to missed work. Similarly, when a person does not have to go to the hospital or miss work because – although she has been in a car accident – a vehicle safety feature mandated by a rule protected her from serious injury, the rule has saved her money. Indeed, in examples too numerous to list here, rules that protect health and safety also protect pocketbooks, as they alleviate the costs of doctor's visits, medicines, hospital stays, lost work days, and other interventions and disruptions associated with ill health and inadequate safety.

Beyond saving money, directly and indirectly, regulation also protects people from harms that are not fully captured as "money saved." Cancers of all kinds, heart attacks, asthma attacks, and more are prevented by environmental rules. Occupational safety rules can help prevent people from being electrocuted or crushed by heavy equipment. Vehicle safety rules can help drivers not back over people (especially children) who are difficult to see in an ordinary rearview mirror. Rules on rail safety help prevent deadly or otherwise injurious train accidents. The full range of human illness and suffering alleviated by regulation is huge.

Regulation also, of course, often prevents (or at least forestalls) the ultimate adverse event, death. In this domain, it is especially important to remember the link between human behavior and human harm; our legal and ethical norms make proceeding in the face of known and avoidable risks of death an especially egregious form of behavior. Yet sometimes even large numbers of saved lives fail to persuade the anti-regulatory crowd that regulation is a good idea; some embattled rules, for example, are expected to save many thousands of lives every year, yet embattled they remain.

To summarize: regulation promotes multiple and diverse human interests and prevents multiple and diverse human harms. To the extent that current debates over the scope and shape of the regulatory state ignore these benefits of regulation, they will lead us badly astray.

II. The False Narrative About Regulatory Costs⁷

⁷ The first part of this discussion is drawn from Lisa Heinzerling and Frank Ackerman, *The \$1.75 Trillion Lie*, 1 Mich. J. Env'tl. & Admin. Law 127 (2012). This article is provided as an attachment to this testimony.

Keeping regulation at bay requires hard work. Disastrous failures of regulation lie just beneath such spectacularly bad problems as the climate crisis, the financial breakdown, the Flint drinking water disaster, and more. It takes constant vigilance to prevent a public outcry for more and better regulation. It also often takes phony numbers.

Often, the phony numbers relate to regulatory costs. One of the favorite phony numbers circulated by the anti-regulatory crowd is the figure of \$2 trillion—supposedly the amount we in the United States spend every year on federal regulations. The figure on total regulatory costs has been widely cited and credulously accepted. It has been wheeled out both to try to defeat new regulatory initiatives and to scale back existing ones. It has also been deployed in the service of a legislative agenda aimed at thwarting the regulatory agencies responsible for these purportedly massive costs.

The latest iteration of this number comes from a report prepared in 2014 for the National Association of Manufacturers (NAM).⁸ Authored by Lafayette College economists Nicole V. Crain and W. Mark Crain, the report concludes that \$2 trillion is the combined annual cost of complying with economic regulations, environmental regulations, the federal tax code, occupational safety and health regulations, and homeland security regulations.

The Crain and Crain report is not, however, a credible account of the costs of regulation in this country. Several critiques of an earlier Crain and Crain report, which used similar methodologies, have pointed out that not only did that report completely omit discussion of the benefits of regulation—thus providing an entirely one-sided picture of regulatory consequences—it also used evidence not intended, nor suitable, for the purposes to which Crain and Crain put it.⁹ It also explained away its own potential cost overestimation by asserting—contrary to existing evidence¹⁰—that regulatory agencies tend to underestimate regulatory costs.

The economist Frank Ackerman and I have taken another, even deeper plunge into Crain and Crain's earlier estimates of costs and have found equally troubling

⁸ W. Mark Crain and Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* (2014), available at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

⁹ For a detailed critique of the previous iteration of this study, see Sidney A. Shapiro et al., *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (2011), available at http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.

¹⁰ Shapiro et al., at 7–9.

problems.¹¹ We focused on Crain and Crain's estimates of the costs of economic regulation, environmental regulation, and workplace safety and health regulation. Together, these categories accounted for approximately \$1.6 trillion of Crain and Crain's earlier \$1.75 trillion estimate.

Ackerman and I found numerous problems in Crain and Crain's earlier study, problems that continue in their more recent report written for NAM. For example, Crain and Crain's estimates of the costs of environmental regulation are deeply troubled. For environmental rules issued before 1988, they rely on a single study published in 1991 that uses a general equilibrium model to spin out a conjecture about a possible impact of early 1980s regulations as a whole: if regulatory costs raise prices in general, then real wages will drop; at lower real wages, textbook economics implies that workers will choose to work less, reducing output and incomes. For regulatory costs of environmental rules issued after 1988, Crain and Crain—among other mistakes—claim costs for regulations that no longer exist because the agency itself pulled them back; they include costs of rules that no longer exist because the courts overturned them; they double count by including sets of rules that all have the same regulatory end; and they include the costs of regulations issued many years, sometimes decades, ago, the current costs of which (if they still even exist) cannot be fairly attributed to regulatory programs.

In estimating the cost of workplace rules, Crain and Crain rely—indirectly, after laundering it through several more recent studies from marginally less partisan sources—on a study done in 1974 by the National Association of Manufacturers. Beyond reliance on an outdated and highly partisan source, Crain and Crain's estimates of the costs of workplace rules also suffer from the same flaws embodied in their estimates of the costs of environmental rules.

Added to the numerous flaws revealed by other commentators, the problems Frank Ackerman and I found with Crain and Crain's estimate of regulatory costs raised a disturbing possibility: the mistakes were so many, cut in only one direction so thoroughly, and could have been discovered by the authors so easily, that one is pressed to conclude that the study was *designed* to produce a really big number. The number is a rhetorical device, a talking point, a trope; it is not the product of sound analysis.

The development and wide circulation of misleading statistics, supposedly showing the foolishness of regulation, is not a new phenomenon. Previous periods of discontent with the scope and content of regulatory activity have also featured arresting statistics that, all by themselves, appear to make the case for regulatory reform: federal regulations spend hundreds of millions, even billions, of dollars to

¹¹ Lisa Heinzerling and Frank Ackerman, *The \$1.75 Trillion Lie*, 1 Mich. J. Env'tl. & Admin. L. 127 (2012). This article is provided as an attachment to this testimony.

save a single human life;¹² regulation “statistically murders” 60,000 people a year by directing limited resources to very expensive life-saving measures rather than to cheaper ones;¹³ once a regulation costs more than a certain amount (estimates ranged from \$3 to \$50 million) to save a life, people are killed through this cost alone because it prevents spending money on other life-saving measures like health care.¹⁴ Just as the \$2 trillion figure has been served up as an exhibit in the case for regulatory reform, so these previous statistics were offered to prove that the regulatory system had gone badly awry. The trouble was, these statistics were no more reliable than the statistics offered by NAM's study on regulatory costs.¹⁵

Another charge that has been leveled against regulation in recent years is that it kills jobs. Indeed, the claim has become so prevalent that it sometimes seems that the word "regulation" simply must be preceded by the phrase "job-killing." Here, too, however, the actual evidence does not support this broad critique. In a 2011 briefing paper prepared for the Economic Policy Institute by Isaac Shapiro and John Irons, the authors reviewed the literature on the relationship between regulation and employment.¹⁶ They began by reminding readers that regulation often is designed to prevent market failures that will themselves lead to unemployment, giving as their prime examples the financial crisis, the BP oil spill of 2010, and the market-reassuring provisions of the Food Safety Modernization Act. They then canvassed the literature on regulation and employment, finding that economy-wide studies have "failed to find significant employment effects" and that "a surprising number" of industry-specific studies have shown that "regulations

¹² John F. Morrall III, A Review of the Record, Regulation, Nov.-Dec. 1986, at 25, 30-31.

¹³ Tammy O. Tengs & John D. Graham, The Opportunity Costs of Haphazard Social Investments in Life-Saving, in *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* 167, 172 (Robert W. Hahn ed., 1996).

¹⁴ Randall Lutter et al., The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations, 37 *Econ. Inquiry* 599 (1999); W. Kip Viscusi, Risk-Risk Analysis, 8 *J. Risk & Uncertainty* (Special Issue) 5 (1994).

¹⁵ For previous critiques, see Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press 2004); Lisa Heinzerling, Five Hundred Life-Saving Interventions and Their Misuse in the Debate Over Regulatory Reform, 13 *Risk, Safety & Env't* 151 (2002); Lisa Heinzerling & Frank Ackerman, The Humbugs of the Anti-Regulatory Movement, 87 *Cornell L. Rev.* 648 (2002); Lisa Heinzerling, Regulatory Costs of Mythic Proportions, 107 *Yale L.J.* 1981 (1998) .

¹⁶ See Isaac Shapiro & John Irons, Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown (Economic Policy Institute, Briefing Paper No. 305, 2011), available at http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf; see also Frank Ackerman & Rachel Massey, Prospering with Precaution: Employment, Economics, and the Precautionary Principle (Global Dev. & Env't Inst., Working Paper, 2002), available at <http://www.healthytomorrow.org/attachments/prosper.pdf>.

have a small positive net effect on employment" and that even studies showing some local employment effects "suggest that regulations had either a close to neutral or small positive effect on employment levels."¹⁷

Shapiro and Irons also remind us of the spotty track record of regulatory opponents in estimating the economic effects of regulation. They report: "Claims by opponents of regulations that new rules will have significant and destructive effects on the economy and on jobs have often been exaggerated, sometimes dramatically so."¹⁸ According to Shapiro and Irons, a notable cause of the overestimates of regulatory costs has been the underestimation of industry's own power to innovate.¹⁹

The specific numbers change from time to time, but the game remains the same: make regulation look outlandish by claiming costs and consequences for it that are not real. This is not a sound basis on which to evaluate the regulatory state.

III. The Regulatory Process

One of the current critiques of regulation has it that regulations are the product of a slapdash, almost random process, in which regulators ignore the facts and law and come up with rules that simply reflect their political preferences. This is not true.

Regulations in this country emerge from a careful process of initial study, preliminary proposals, public comment, and final decisions, which explain the agency's reasoning process and its responses to the public's concerns. Producing a final rule can take years. One of the most ironic sources for showing the out-of-control nature of the regulatory state is the number of pages in the Federal Register, the publication that contains agencies' explanations of their proposals and rules.²⁰ In fact, this statistic reveals exactly the opposite of what its publicists contend: the Federal Register has grown in volume not because agencies are behaving arbitrarily or capriciously, but because they are making an effort to explain their decisions in reasoned terms. The Federal Register could be a very short publication indeed if agencies did not do this.

Bills circulating in Congress, including S. 2006 in the Senate, would pile on even more obstacles to regulatory actions. S. 2006 would add new analytical requirements for agency rules, more elaborate hearing procedures, and substantive requirements that agencies adopt the "least burdensome" regulatory measures and that they show that the benefits of their rules justify the costs. Almost amusingly, S.

¹⁷ Id. at 3.

¹⁸ Shapiro & Irons, at 24.

¹⁹ Id.

²⁰ See, e.g., Adam J. White, *Republican Remedies for the Administrative State* (2017), available at http://www.nationalaffairs.com/docLib/20170111_Booklet2_chap1.pdf.

2006 also would require agencies – already straining to complete their analytical tasks within a reasonable time period – not only to add these time-consuming obstacles to their rulemaking process, but also to start all over if they cannot manage to complete the process within two years. Such procedural innovations threaten to delay and even block entirely the many benefits of regulation I have described here.

Attachment: Lisa Heinzerling and Frank Ackerman, *The \$1.75 Trillion Lie* (2012)