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# THE PRUDENT REGULATOR: POLITICS, INDEPENDENCE, ETHICS, AND THE PUBLIC INTEREST

Janice A. Beecher\*

**Synopsis:** *Prudence* is a principle central to the theory and practice of public utility regulation, a hallowed standard of review by which utility behaviors and decisions are judged. The concept of prudence might well be applied to the institution of regulation itself and those responsible for its endurance. By nature and necessity, regulation is a political process, but by design it works best with a substantial degree of independence and when regulators are deeply committed to the ethical performance of their charge. The prudent regulator considers their own behavior not in narrow terms of technical compliance with codes of conduct, but in broader terms of institutional sustainability. The price of imprudence is paid not only by those whose impropriety betrays the public's trust, but by the very institutions they are entrusted to serve. Adopting an institutional perspective, this review idealizes the prudent regulator by examining the intricately related and largely inseparable constructs of politics, independence, and ethics, and the transcendent imperative of regulation in the public interest.

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\* Janice A. Beecher (beecher@msu.edu) has served as Director of the Institute of Public Utilities at Michigan State University since 2002. The Institute's mission is to support informed, effective, and efficient regulation of the infrastructure-intensive network industries that provide essential utility services. Institute operations are funded in part through corporate contributions to the University, a 501(c)(3) organization. Dr. Beecher has twenty-five years of experience in the field of public utility regulation, including positions at the Illinois Commerce Commission, The Ohio State University, and Indiana University. She holds a B.A. in Political Science, Economics, and History from Elmhurst College and a M.A. and Ph.D. in Political Science from Northwestern University. This article is based on Dr. Beecher's ethics lectures at IPU. Nothing herein is intended or should be taken as legal advice. The author extends much appreciation to Harry Trebing, Douglas Jones, Burl Haar, and Charles Matzke for comments, suggestions, and encouragement.

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*“Whatever you undertake, act with prudence, and consider the consequences”* (Anonymous)

#### I. THE GOOD REGULATOR

Pundits sometimes ponder the qualities that make for a “good” economic regulator. Since the emergence of the railroad commissions in the middle 1800s, regulation’s principals have reflected a wide spectrum of political, demographic, educational, professional, and other characteristics. Anecdotal experience suggests that good (and not-so-good) regulators come in many shapes and sizes; that individual regulators may underperform or outperform expectations based on any number of attributes; and that no single metric or set of criteria define with certitude a “good” regulator. General qualification, political custom, and screening processes notwithstanding, the job of economic regulator, federal or state, has few if any prerequisites or reliable litmus tests. As with many positions of public responsibility, personal character may ultimately be of greater consequence than any particular academic credential or resume line.

Nonetheless, impressionistic observation of many regulators over many years is suggestive of some largely indubitable generalizations. The good regulator is *dedicated to public service*. The post pays relatively well along government scale, but typically less than the private sector, and primarily attracts those with a civic impulse. A regulatory career is probably not well suited to those whose dogma disfavors governance and the legitimate role of the state to intervene in the economy. The job is not “just a job” but a frame of mind. The good regulator *embraces the public interest*, appreciates the daunting obligation to it, and accepts the often agonizing process of its discovery. Easier to sense than to define or instill, the public interest is divined not through opinion polls or political expediency but by the deliberative weighing of subordinate interests in the context of a social compact to pursue a larger common good. The calculus of the public interest in many respects is a process of elimination,<sup>1</sup> informed by politics but guided by established principles, educated instincts, and the artful blending of science and conscience.

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1. Regulatory law gives some guidance about what the public interest is *not* (e.g., burdensome or discriminatory pursuant to the Sierra-Mobile Doctrine.); see generally *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Co.*, 350 U.S. 348 (1956). For a public policy perspective, see generally JAMES E. ANDERSON, *PUBLIC POLICYMAKING* 137-139 (Houghton Mifflin 6th ed. 2006) [hereinafter ANDERSON].

Given the substantive demands of that process, the good regulator demonstrates *intellectual curiosity* in general and a genuine interest in the subject matter at hand. Given the import of their roles and decisions, disinterest or boredom on the part of regulators does not bode well. The intellectually curious appreciate complex and multi-disciplinary problems and solutions, apply critical thinking skills, exhibit healthy skepticism, appreciate empirical analysis, and welcome constructive debate. Regulators are more than likely to find themselves outside of their intellectual comfort zone. The public-interest mandate, along with the mental rigor of the work, also argue for self-awareness and bringing a healthy dose of *personal humility* to the task of regulating, which at times may seem antithetical to the political ego and immodesty required of those who seek high office. Hubris, obstinacy, and stridency are clearly contraindicated.

*Independence* from various political interests, even to those to which they feel beholden, is another essential characteristic. Good regulators are generally non-ideological, non-dogmatic, and without agenda or parochial motive. Given the political context and import of their position, the regulator cannot be apolitical, but whether elected or appointed, their service in office should be impartial, unbiased, and nonpartisan not just with respect to political parties, but all parties of interest. Commissioners dispense a specialized form of justice and are well served by adopting a *judicial demeanor*, temperament, and disposition. The judgeliike commissioner is circumspect but decisive and incapricious in the discharge of their duties. Also working to their advantage in the commission cultural model are maturity, sensibility, patience, and collegiality. Last and certainly not least, good regulators demonstrate a conscientious and uncompromising *commitment to ethics*. They operate at all times with the knowledge that perceptions and appearances count as much or more than technical compliance with any jurisdiction's particular code of ethics. Without self-righteousness, prudishness, or judgmentalism, the good regulator aspires to meet and exceed the expectations of integrity and probity attached to their office.

The *prudent* regulator knowingly and authentically embodies all of these virtues – dedication to public service, obligation to the public interest, intellectual curiosity, personal humility, political independence, judicial demeanor, and commitment to ethics – as well as an understanding and appreciation of why they matter fundamentally to the institution. Good and prudent regulators are a necessary condition for good regulation – regulation in the public interest that is reasoned, equitable, and efficacious.

## II. REGULATORY POLITICS

Regulation is governing and governing is political. While “legal,” “social,” “economic,” or “technical” are regarded positively, being “political” is almost always viewed pejoratively. Politics – the art of diplomacy, the act of governing, and the determination of “who gets what, when, [and] how”<sup>2</sup> – is central to civil society, democracy, and the translation of values into public policy. The American culture is infused with politics and behaving politically is

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2. HAROLD LASSWELL, POLITICS, WHO GETS WHAT, WHEN, HOW (McGraw-Hill Book Co., Inc. 1950) (1936).

normal, not exceptional. Democratic politics are necessary and better than the alternatives,<sup>3</sup> but imperfect and vulnerable. Politics are interest-driven and the results of political processes may not comport with the ideals of representative democracy and the public interest. When bad politics meet bad process, bad outcomes result. *Political* is not inherently *unethical*, but politics can motivate or exacerbate ethical queries.<sup>4</sup> More importantly, ethical breaches can exact a penultimate political price because they undermine the public's very trust in governance and institutions of authority.

Opinion polls consistently reveal the tenuous trust of government,<sup>5</sup> as well as the public's wariness about the state of moral values, allegations of misconduct by politicians, and the ability of the political parties to "deal with" problems of ethics.<sup>6</sup> Among the professions, members of Congress (along with journalists and lawyers) are not regarded as particularly "trustworthy"; scientists, professors, and judges fare much better.<sup>7</sup> The public is especially disapproving of "cozy" relationships between lobbyists and public officials of various ranks and responsibilities. The bad apples appear with enough regularity and notoriety to feed the public's cynicism and make it difficult for the trustworthy to earn their due. Rebuilding broken trust is always arduous.

Given both high stakes and far-reaching consequences, it comes as no real surprise that regulation is political *and always has been*. Regulatory politics are a microcosm of politics in general, where a range of interests compete for "who gets what" in a measured manner meant to reveal the public interest. Regulation as an institution was born of political compromise.<sup>8</sup> Regulatory decisions are made in a political environment, are shaped by politics, and have political consequences. Regulators are political beings and the office may tend to both draw and favor the politically inclined and experienced. With notable exceptions,<sup>9</sup> utility regulation infrequently provides a path to higher political

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3. In Winston Churchill's prescient words, "Democracy is the worst form of government except for all those others that have been tried." Winston Churchill, Speech to the House of Commons (Nov. 11, 1947) in WINSTON CHURCHILL, *EUROPE UNITE, SPEECHES 1947 AND 1948* 200 (Randolph S. Churchill ed., Houghton Mifflin Co. 1950).

4. Alan Greenblatt, *The Corruption Puzzle*, GOVERNING, July 2008, available at <http://www.governing.com/articles/0807/corruption.htm> (the author considers the role of zealous prosecution in bringing more graft to light and suggests the need for legislative ethics reform and enforcement).

5. THE AMERICAN NATIONAL ELECTION STUDIES, UNIV. OF MICH. CTR. FOR POLITICAL STUDIES, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR available at <http://www.electionstudies.org/nesguide/nesguide.htm>.

6. PollingReport.com, Government and Politics: ABC and CBS News polling results, <http://www.pollingreport.com/values.htm> (last visited Sept. 10, 2008); PollingReport.com, Government and Politics: ABC and CBS News polling results, <http://www.pollingreport.com/politics.htm> (last visited Sept. 10, 2008).

7. *Id.*

8. Early reformers found that "public utilities are so constituted that it is impossible for them to be regulated by competition. . . . None of us is in favor of leaving them to their own will, and the question is whether it is better to regulate or to operate," National Civil Federation (1907) as cited in CHARLES A. BEARD, READINGS IN AMERICAN GOVERNMENT AND POLITICS 548 (Macmillan Co. 1909).

9. Prominent former regulators include Governor and United States Environmental Protection Agency Director Christine Todd Whitman (New Jersey), United States International Trade Commissioner Charlotte Lane (West Virginia), Governor Kathleen Blanco (Louisiana), Senator Paula Hawkins (Florida), and Representative J.C. Watts (Oklahoma). Many federal commissioners have been promoted from the state

office, perhaps partly because regulatory decisions must seek balance and justice above political expediency, popularity, or ambition. In fact, regulation, when done well, can be distinctly *unpopular* because typically, despite accepted legitimacy, no constituency is completely satisfied.

#### A. *Politics of Partisanship*

The partisanship and ideology that may be key to electoral success or law-making are antithetical to the doctrine of independent regulation. For many regulatory bodies, the administration's party can claim no more than a majority of commissioners, although executives may be inclined to seek moderates and relatively like-minded "independents" to fill minority spots. Requirements for party diversity, staggered terms, and the more limited use of selection criteria, intend to mitigate partisan influence and policy swings, along with associated instability, inconsistency, and uncertainty. When administrations change amid heightened partisanship, staggering can also introduce friction between old and new commissioners over divided loyalties and differing agendas. Administrative procedures and judicial review also provide checks and hold commissions accountable for collective decisions that are supported by law and an evidentiary record. Nonetheless, partisan politics can be manifested in the composition of commissions, changing with electoral cycles, and also in executive and legislative policies and oversight. Party affiliation is one of several influences in dynamic regulatory environments, but not necessarily a clear or consistent predictor of commissioner decision-making behavior.<sup>10</sup> Although evidence to the contrary may be seen in politically charged environments, both the theory of independent regulation and its judicial features indicate that the effect of party should be negligible.

Elected, appointed, re-elected, and reappointed regulators all "campaign" for the position and seek political approval. Partisan and special interests weigh in on the selection process, publicly and behind the scenes. Connections may trump credentials and cronyism can creep in. The concern is not the *input* from various interests but the potential for *influence* beyond the selection process. A chagrined Franklin D. Roosevelt asserted:

It is an undoubted and undeniable fact that in our modern American practice the public service commissions of many States have often failed to live up to the very high purpose for which they were created. In many instances their selection has been obtained by the public utility corporations themselves. These corporations, to the prejudice of the public, have often influenced the actions of public service commissions. Moreover, some of the commissions have... adopted a theory, a

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commissions. Select biographical data on U.S. federal and state public utility commissioners are maintained by the Institute of Public Utilities at Michigan State University, <http://ipu.msu.edu>.

10. For an empirical assessment of commission behavior, see Keith S. Brown & Adam Candeub, *What do Bureaucrats Want: Estimating Regulator Preferences at the FCC* Mich. State Univ. Legal Studies Paper No. 05-01 (Apr. 8, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008313](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008313) (finding that "Commissioners do not move in partisan lock step." Commission decision-making tends to be highly consensus driven, as many Chairs will promote. In the absence of agreement, partisanship plays a role but is dominated by idiosyncratic factors, including personal agendas shaped by ideology or other motivations).

conception of their duties wholly at variance with the original object for which they were created.<sup>11</sup>

Decades later, watchdogs echoed that “[t]he intrusion of politics into deciding who will sit on a board created to look out for the public interest is not uncommon. Commissioners are much more likely to have a background in politics or the utility industry than experience as consumer advocates.”<sup>12</sup> Political background alone should neither qualify nor disqualify prospective regulators, and political acumen can serve regulators well. This rendition of the revolving-door hypothesis also rests on speculation about whether the *past* employment of regulators is material to their conduct, while begging the question of whether it is as relevant as the prospect of *future* employment in the public or private sectors.

### B. Contemporary Regulatory Politics

Politics are ubiquitous in each major period of regulatory history, from origins that coupled progressive reform and industry protectionism; to the New Deal and expansion of the federal role; to nascent energy markets and the Bell divestiture; to restructuring and now “regulatory rethink” and selective “regulatory redux.” Each era in regulation has been marked by its own brand of politics. Today’s issue-intensive agenda features market performance and market power, jurisdictional primacy and federal preemption, infrastructure investment, rising costs and their allocation, corporate governance, universal service, and resource management. Many of these matters bring attention to regulatory roles, but also to obligations that may in turn be examined in political, social, and even moral terms.<sup>13</sup> Policy choices relating to the digital divide, access to clean and safe water, environmental justice, and global climate change well illustrate.

Regulation in the new millennium is probably no more political, but certainly no less. Contemporary regulatory politics are palpable, pluralistic, positional, and sometimes polarizing. The issues are complex, the debate is fervent, and the financial and political stakes are high. Regulator and legislator turnover has shortened institutional memories and affected adversely the quality and tenor of policy discourse. Many commissioners are politically experienced and disposed; some may have found that regulation offered a career path following a term limited legislative post.<sup>14</sup> As in the past, partisanship, ideology, and personal agendas can be apparent. Appointing executives may expect and appointed commissioners may want to deliver preordained policies. Although it seems to belie the theory that regulators are driven by self-preservation, a

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11. Franklin D. Roosevelt, *The Portland Speech: A Campaign Address on Public Utilities and Development of Hydro-Electric Power* (September 21, 1932), available at <http://newdeal.feri.org/speeches/1932a.htm>.

12. THE CENTER FOR PUBLIC INTEGRITY, *NICE WORK IF YOU CAN GET IT: POLITICAL PATRONAGE RULES IN STATE UTILITY COMMISSIONS* (2005), available at <http://www.projects.publicintegrity.org/telecom/report.aspx?ais=762>.

13. The worthy concept of regulatory “morality” is beyond the scope of this discussion.

14. Janice A. Beecher, *Commissioner Demographics 2008*, INSTITUTE OF PUBLIC UTILITIES RESEARCH NOTE, Mar. 12, 2008, [http://ipu.msu.edu/research/pdfs/Commissioner%20Demographics%20\\_\(2008\).pdf](http://ipu.msu.edu/research/pdfs/Commissioner%20Demographics%20_(2008).pdf) [hereinafter *Demographics*].

distinctly modern development is the proclivity of some federal and state regulators toward *deregulation*.<sup>15</sup> The dissonant politics of restructuring have opened policy schisms, cast a pall in the policy climate, and resulted in much uncertainty about the future of both markets and regulation. At least one instance of political compromise to redress restructuring finds reincarnated regulation in an arguably weakened state.<sup>16</sup>

The concerted and wide circulation of extra-record “open letters” from stakeholders and others to policymakers, particularly but not exclusively in the context of restructuring, is one of the curious devices of contemporary regulatory politics. Asking the commission “to declare that competition does not exist in the residential market,”<sup>17</sup> the Governor of Illinois warned appointees that, “I consider an approval of [the proposal] either a serious neglect of duty or gross incompetence.... I urge you to uphold your duty to properly apply the law.”<sup>18</sup>

Two days later, a “disappointed” company responded with its own letter, urging the Governor to “respect the integrity of the [commission] process and join the debate rather than try to end it.”<sup>19</sup> Members of Congress openly implored the Federal Energy Regulatory Commission (FERC) to “provide prompt relief for consumers...who have been severely – and undeniably – harmed by [their] region’s dysfunctional energy markets and the associated unjust and unreasonable wholesale electric prices.”<sup>20</sup> Former FERC regulators once expressed their “support for continuing federal policies to promote open and competitive markets for electric power.”<sup>21</sup> Former state regulators who were “there to witness that the ‘good old days’ of electricity regulation were actually not that good,”<sup>22</sup> later declared that “[i]f given a chance, consumers will tell the market what they want and the market will respond.”<sup>23</sup> Some “notable

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15. Public choice economists advanced the idea that regulation results from the rational self-interest of participants. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL JOURNAL OF ECON. & MGMT. SCI. 3, 3-21 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 JOURNAL OF LAW AND ECON. 211, 211-240 (Aug. 1976). A parallel can be found in the libertarian leanings of some modern public officials. In any case, those who envision regulation’s quick demise are likely to be disappointed by persistent requirements for market oversight and the demanding standards of workable competition, if and when it can be achieved.

16. S.B. 1416, 109th Gen Assem., Reg. Sess. (Va. 2007) (enacted) (amending and reenacting sections of the Code of Virginia relating to the regulation of electric utility service).

17. Letter from Illinois Governor Rod R. Blagojevich to the Illinois Commerce Comm’n (Aug. 31, 2005) (<http://www.secinfo.com/duJch.z7n.d.htm>).

18. *Id.*

19. Letter from Frank M. Clark, President, Commonwealth Edison to Illinois Governor Rod R. Blagojevich (Sept. 2, 2005), *available at* <http://www.secinfo.com/dsvRm.zAxb.d.htm#1stPage>.

20. Letter from Senator Maria Cantwell, Senator Ron Wyden, Senator Patty Murray, and Senator Harry Reid to Pat Wood, Chairman, Federal Energy Regulatory Comm’n (May 24, 2002) (<http://cantwell.senate.gov/news/record.cfm?id=243160&>).

21. Letter from Vicky A. Bailey, Linda Breathitt, Nora Mead Brownell, James J. Hoecker, Jerry J. Langdon, William L. Massey, Elizabeth Anne Moler, Donald F. Santa, and Pat Wood, III to Policymakers (May 31, 2007), *available at* <http://www.allianceforretailchoice.com/formeropenletter.pdf>.

22. Letter from Former State Utilities Commissioners to U.S. Electricity Policymakers (November 7, 2007), *available at* [http://blogs.chron.com/lorensteffy/Commissioners%20Letter%20to%20Policymakers\\_Competitive%20Markets%20are%20Working.pdf](http://blogs.chron.com/lorensteffy/Commissioners%20Letter%20to%20Policymakers_Competitive%20Markets%20are%20Working.pdf).

23. *Id.*

economists” urged policymakers to “stay the course and continue to support restructuring and the evolution of competitive wholesale and retail markets for power.”<sup>24</sup>

The postal delivery of facts, opinions, or expertise exempts them from examination and rebuttal under the bright light of the evidentiary process. Any assignment of weight to their merits can be very arbitrary. Though not necessarily untoward, open letters are somewhat peculiar, simultaneously suggestive of participatory democracy and pressure politics. Indeed, these campaigns speak literally to the “clamor and criticism” that can enter the regulatory forum and test the discriminating sensibilities of the regulator to rise above the fray.

The value of independent regulation may be particularly high when political tolerance for it is particularly low; that is, when regulatory decisions are unpopular, when partisan loyalty is demanded, and when the autonomy of commissions relative to executives and legislatures is cast into doubt. An extreme form of political reprisal against regulatory agencies is abolishment by reorganization. The governor of Tennessee replaced the state’s elected body with an appointed commission in 1996.<sup>25</sup> The Alaskan legislature reorganized the state’s commission in 2000 and imposed a three-year sunset provision.<sup>26</sup> In 2007, by newly adopted constitutional article, the governor of Massachusetts split the agency, reassigned functions, placed the commission under an executive department, reduced the number of regulators, and altered commissioner appointments from statutory to “serving at the pleasure.”<sup>27</sup> Serving at the pleasure means not serving at the displeasure, which politicizes regulation and places appointed commissioners in constant political jeopardy. While structural reorganization could be used to make regulatory agencies more independent, politically motivated makeovers often make them less so.

Electricity restructuring opened ideological and policy divides across and within states. High political drama ensued in the wake of public outcry over escalating rates, set in motion partly by states’ own legislation. The specter and spectacle of political incursion has involved government’s various branches. Attempted executive suasion in Illinois was trumped by legislation in Maryland to disband and replace the commission, but both had destabilizing effect.<sup>28</sup> Complicating these cases were accusations of assorted

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24. Letter from Paul L. Joskow, Alfred E. Kahn, William W. Hogan, Peter Cramton, Howard J. Axelrod, Vernon L. Smith, David W. Deramus, and Gary L. Hunt to Policymakers (June 26, 2006), available at <http://www.mresearch.com/pdfs/280.pdf>.

25. THE TENNESSEE ENCYCLOPEDIA OF HISTORY AND CULTURE, TENNESSEE PUB. SERV. COMM’N, <http://tennesseeencyclopedia.net/imagegallery.php?EntryID=T054>.

26. Regulatory Comm’n of Alaska, ALASKA STAT. § 42.04.01 (2008); Expiration of state boards and commissions, ALASKA STAT. § 44.66.010 (2008).

27. MASS. GEN. LAWS ANN. Ch. 31, § 41 (West 2008).

28. See *supra* note 17; Andy Shaw, *Governor replaces ICC chairman with consumer advocate*, ABC NEWS (WLS, CHICAGO), Sep. 21, 2005, available at <http://abclocal.go.com/wls/story?section=news/local&id=3464717>; and Mark Jamison, *et al.*, *Disbanding the Maryland Public Service Commission (Public Utility Research Center Case Study 2006-2)*, Jul. 2006. In 2007, commissioner resignations were requested by the Ohio Attorney General because their nomination allegedly violated the state’s Sunshine Law; commission critics seized the moment. Alan Johnson, *3 PUCO officials*

improprieties, resignations by some of the embroiled, and, in Maryland, alleged partisan motives in the dismissal of senior staff members.<sup>29</sup> A court eventually ruled the attempted legislative firing of the Maryland regulators unconstitutional.<sup>30</sup> Ethical breaches, unlike political discord, suggest the prospect of voluntary resignation or legitimate removal of officials *for cause* in accordance with due process (such as rights to a hearing) and defined criteria (such as malfeasance, misconduct, or criminality).<sup>31</sup> Some of the specified criteria for truncating a commissioner's term, such as incompetence, neglect of duty, fitness, or inefficiency, may be susceptible to political interpretation and should be held to a high burden of proof.<sup>32</sup> Disagreement over policy or its impacts, no matter how heated, should be insufficient. As put by one expert on judicial conduct, "[i]t's one thing to be wrong. It's another thing to be unethical."<sup>33</sup> Independence must be preserved and defended, in other words, not just when regulatory decisions are agreeable. The protection of commissioners from reactionary politics is protective of the commission itself and removal without just cause is as injurious to the institution as to the individual.

Policy ends cannot justify political means of subverting independent regulation. On matters of policy, executives and lawmakers must find constructive methods of authoritative expression other than the politically motivated and potentially capricious dismissal of lawfully appointed regulators engaged in lawful regulatory functions. Commissioners should not be punished politically for implementing ill-conceived statutory policies that confine regulatory discretion to unreasonable and unacceptable options, although they are obliged to express their reservations. Commissioners who flout legislative intent, thwart governmental oversight, skirt rules of practice, violate ethical codes, or ignore the general will clearly do so at their peril. Commissioners should be held accountable for policies, processes, and outcomes of their doing, but by established legislative, judicial, and political means, respectively (*e.g.*, laws, appeals, and selection processes). Commissioners operating in good faith to serve the public and the public interest, however, should be secure in their appointments, unencumbered by political meddling and its chilling effects, and free to respectfully dissent from the policy preferences of those in power.

Like all politics, regulatory politics become pernicious when slighter political interests, including the self-interest of politicians, overwhelm the public interest and undermine the public trust. Excessive politicization and undue influence weakens regulation as an institution and instrument of public policy.

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*asked to resign*, THE COLUMBUS DISPATCH, Apr. 4, 2007 and Alan Johnson, *Critics want new members at PUCO*, THE COLUMBUS DISPATCH, Apr. 5, 2007, available at <http://www.dispatch.com/>.

29. See Jamison, *supra* note 28 and David Nitkin & Kelly Brewington, *PSC head, lobbyist shared strategy – Schisler, industry advocate exchanged e-mails last year*, BALTIMORE SUN, Mar. 18, 2006 (while the governor referred to the disbanding of the Maryland commission as “decapitation,” critics and the press referred to the removal of the staff as the agency’s “lobotomy”).

30. *Schisler v. Md.*, 907 A.2d 175 (Md. 2006).

31. In Michigan, *e.g.*, a commissioner “may be removed by the governor for misfeasance, malfeasance or nonfeasance in office.” MICH. COMP. LAWS § 460.2 (1951).

32. See, *e.g.*, Public Utilities, CAL. CONST. art. XII, § 1 (2008); Regulatory Comm’n of Alaska, Commissioners, ALASKA STAT. § 42.04.020 (2008).

33. Tim Carpenter, *Justice charged with violations*, THE TOPEKA CAPITAL-J., May 13, 2006 quoting Cynthia Gray, director of the Center for Judicial Ethics at the American Judicature Society.

Regulation that is “too weak,” when intervention is reasoned and necessary, is as bad or worse for markets and commerce as regulation that is “too strong” because weakness leads to political backlash, and paradoxically, to draconian political solutions directed toward regulators or the industries they regulate. The downward spiral of vital policy institutions can be fueled by the loss of independence and catalyzed by ethical breaches. The charge of the prudent regulator is to transcend parochial politics and to guard with tenacity their independence, and thereby the institution they serve.

### III. REGULATORY INDEPENDENCE

Independence and impartiality are central to the original purpose, design, and conduct of regulation in the public interest. According to the public-interest model, regulatory commissioners and their professional staff are entrusted by the public, with the expectation that they will be *relatively independent* from each other; from executives (such as presidents and governors who may have appointment authority); from legislatures (who may have confirmation, policy, and oversight authority);<sup>34</sup> from political parties, factions, and interest groups of all varieties; from ancillary interests (such as vendors, think tanks, and the financial community); and, of course, from regulated utility companies and their various representatives or agents (legal counsels, consultants, and associations).<sup>35</sup> The Rawlsian conception of justice might have commissioners wear a “veil of ignorance” to filter bias from both rulemaking and ruling.<sup>36</sup> Regulators are not ignorant or negligent of the many interests around them, but are properly separated by degrees of freedom to ensure the integrity of the regulatory process.

Public utility commissions may be creatures of the executive or legislature, possibly tethered to them on an organizational chart, but generally they are not regarded as extensions of those offices or in their service. Commission structures and processes reinforce their institutional autonomy and provide for policy continuity.<sup>37</sup> Regulatory discretion within a “zone of reasonableness”<sup>38</sup> is considerable by design and for good reason; that is, to provide a superior means of policymaking relative to functional alternatives (administrative, legislative, or judicial).

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34. In economic regulation, “legislative ratemaking” played a role in the creation of independent commissions in the first place.

35. A markedly different perspective, argued in historical context, is that independence is “a device to escape popular politics” that it can “alienate commissions from sources of political strength,” that it can acquire “a sacred inviolability,” and that regulation will be more susceptible to industry influence and less effective as a result. MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 101 (Princeton University Press 1966) (1955) (The argument also implies preference for the election of commissioners).

36. JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard University Press 1971).

37. “The Commission is deliberately structured to have a significant degree of independent decision-making autonomy.” MINNESOTA PUB. UTIL. COMM’N, ABOUT US, <http://www.puc.state.mn.us/about/index.htm> (last visited Sept. 8, 2008).

38. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *see also* Federal Power Act of 1920 16 U.S.C. § 791a (2006).

A. *Bounded Independence*

Independence calls for insulating regulation from immediate forms of influence and interference. Nonetheless, regulatory autonomy and discretion are not absolute but “bounded,” and regulators are held responsible for their decisions and their behavior in a complex and diffuse system of interests, relationships, and processes (Exhibit 1). This model provides an institutional answer to the question, “who regulates the regulator?” To a significant degree, however, regulators must regulate themselves.

Governmental mechanisms of accountability encompass *political accountability* from voters, the legislature, and the executive. Examples include democratic elections, appointments and reappointments, appropriations, audits, and legislative oversight. In fourteen jurisdictions, commissioners are elected and accountability to voters is more direct.<sup>39</sup> *Procedural accountability* to the rule of law is imposed by constitutions, statutes, and the judiciary. Examples include rules of due process, precedents, judicial review, transparency, and codes of conduct. The procedures of administrative law provide for fairness, as well as accountability. Legislative response and judicial review provide checks and balances on the public’s behalf, at times either validating or voiding commission policy. Testing the boundaries of independence is also core to the rich and revered history of constitutional case law that has guided regulators for more than a century.<sup>40</sup> Nongovernmental mechanisms include *constituent accountability* (e.g., to utilities, consumers, and interest groups) and *exogenous accountability* (e.g., to the media, evaluators, and financial markets). Both governmental and nongovernmental mechanisms of accountability provide means to engage the public, in addition to opportunities provided in the regulatory process itself.

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39. *Demographics*, *supra* note 16. (South Carolina commissioners are elected by the Joint Assembly according to districts; Virginia commissioners are elected by the General Assembly).

40. *See generally* RICHARD PIERCE, *ECONOMIC REGULATION: CASES AND MATERIALS* (Anderson 1994) and JEFFREY L. HARRISON, THOMAS D. MORGAN, & PAUL R. VERKUI, *REGULATION AND DEREGULATION* (West 3d ed. 2004).

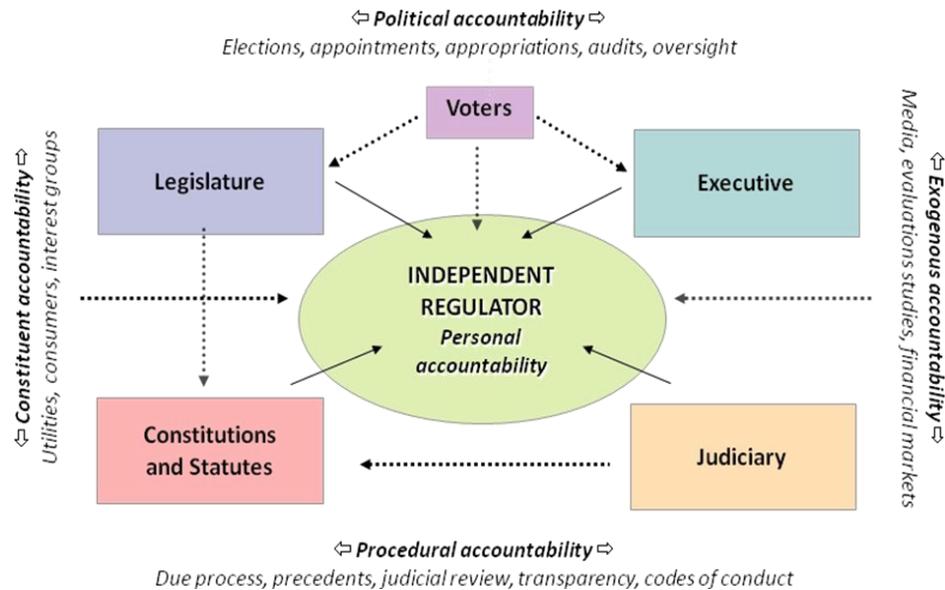


EXHIBIT 1. ACCOUNTABILITY AND THE BOUNDED INDEPENDENCE OF THE REGULATOR.

The system is dynamic in its entirety and each form of accountability may instigate other forms. At the center of the system is the regulator, whose independence is both bound by and enhanced by personal accountability. The prudent regulator is true to the mandates of independence while respecting the environment in which they operate and the essential institutional boundaries that confer regulation's authority and legitimacy, as well as ensure accountability.

### B. Interests and Influence

In a pluralistic society, special interests compete for policy attention.<sup>41</sup> Parochial, vested, or special interests are *legitimate* interests that are construed considerably more narrowly than the *public interest*, which indeed should be the independent regulator's sole special interest and object of allegiance. Special interests and their groups contribute to governance by elevating issues on the public and policy agendas and contributing information and perspective to discourse and discovery.<sup>42</sup> Not all interests are represented or represented well, reflecting disparities in political and economic power. Interest advancement takes many forms and may be attempted by principals (that is, parties to regulation) or their agents. Third-party agents and ancillary interests (such as service and equipment vendors) are omnipresent in modern regulation because they share a material stake in its outcomes.

41. On the detrimental effects of interest-group liberalism, manifested by "hyper-pluralism," see generally THEODORE J. LOWI, *THE END OF LIBERALISM THE SECOND REPUBLIC OF THE UNITED STATES* (Norton) (1979).

42. ANDERSON, *supra* note 1

Influence may be targeted strategically to the particulars of legislation, rules, orders, and policy resolutions, as well as to more general image-building for an entity or cause. Regulators can be bombarded with information from immediate parties, formal intervenors, and an array of other sources. Corporate lobbyists in general fare better than others in terms of both information and access. Regulated companies, notably long-standing incumbents, are better positioned than nonincumbent and nondominant participants (that is, private, public, and nonprofit “underdogs”). It is not unusual for industry lobbyists to supply draft policy language during the formulation stage of the policy process. Providing persuasive information to policymakers is a principal lobbying tool, and lobbyists are unlikely to supply information that does not advance their perspective. Although ratepayers supply all of the public utility’s revenues, lobbying expenses normally are borne by shareholders because shareholder interests are likely at issue.<sup>43</sup>

Information is rarely neutral; that which is has extraordinary value. Bias and manipulation affect what information is supplied and its validity and reliability. Unexamined opinion is proffered as fact. Advocacy is cloaked as research. Experts for hire become tainted. Centers, think tanks, and foundations promote ideas and ideologies. Information asymmetry, a function of resource asymmetry, favors some interests over others in the regulatory process and presents a moral hazard for those with advantage.<sup>44</sup> Effective informal and formal intervention on behalf of smaller consumers or other interests can be costly and cumbersome.<sup>45</sup> The prudent regulator is discerning, and cognizant of the potential for the lopsided quantity, quality, and aesthetics of information to tip the scales of justice.

Differential access, a function of resources and of rules, can also be distorting and deleterious. Access is advantage in placing issues on the policy agenda and advancing positions; marginalization and exclusion matter to both process and outcome. The well-heeled can walk the hallways in the courts, in the legislatures, and at the commissions, shopping for the venue with the greatest probability of success and trying the alternatives in the face of defeat. The letter of the law or the details of procedure may corroborate exceptions or exemptions that allow special access by special interests. Some stakeholders may rationalize that rulemakings, in contrast to contested proceedings, constitute administrative or legislative policymaking and are fair game for confabulation and lobbying. But to under-resourced, less sophisticated, disfavored, or otherwise disadvantaged parties, fairness in effecting the rules of the game is *at least as* important to fairness in adjudication once the rules are in place. The regulatory process should serve not just interested parties, but *affected interests*. Policymaking by rulemaking arguably should be not less but *more* democratic,

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43. That is, actual shareholder returns are net of lobbying and other expenses allocated “below-the-line.”

44. See, e.g., Katherine Swartz, *Justifying Government as the Backstop in Health Insurance Markets*, 2 YALE J. OF HEALTH POL’Y L. & ETHICS 89, 96 n.12 (2001).

45. Intervention can be supported through state subsidies or structurally; see, e.g., DIVISION OF RATEPAYER ADVOCATES, STRATEGIC PLAN 2007–2010, <http://www.dra.ca.gov/DRA/Templates/Home.aspx?NRMODE=Published&NRNODEGUID=%7b5D05D2A3-6BC1-4130-A28D-1F72467F11C9%7d&NRORIGINALURL=%2fDRA%2f&NRCACHEHINT=Guest> (last visited Sept. 8, 2008).

open, and inclusive, and carefully guarded from manipulation. In contrasting the more liberal *ex parte* policies of the Federal Communications Commission (FCC) to the more restrictive rules of the FERC, Reiter observes that in FCC rulemaking:

It is certainly true that any party can submit an *ex parte* presentation, but it is also true that the squeaky wheel gets the grease. Only the largest participants can afford the substantial expense of the face-to-face meetings with decision makers.<sup>46</sup> The notices of *ex parte* communications are hardly informative to the smaller user.

Legitimate interests (*e.g.*, property rights or financial welfare) can also be pursued *illegitimately*, that is, when rules are bent to the breaking point. The issue for civil society is not the validity of an interest, but the scrupulousness of the methods by which it is pressed. Inappropriate overtures can be blatant and explicit (*e.g.*, bribery and offers of future employment), but also much more subtle (*e.g.*, small favors, suasion, and sycophantism). Regrettably, some public officials overtly invite influence by expecting or even soliciting material and other favors, small and large.

Perceptions of undue and unfair influence feed the cynical and controversial “capture” theory of regulation, which suggests that regulators follow a predictable life cycle in which they inevitably come to identify closely with the industries they regulate.<sup>47</sup> Capture can be manifested in the “iron triangles” that may form among agencies, legislators, and regulated industries.<sup>48</sup> Imbalanced socialization and immoderate coziness may accelerate the process. Bias that creeps in with no other impropriety is bias nonetheless. Socially responsible participants in regulation across the board, including regulated interests, share a commitment to upholding the integrity of the process by shunning unlawful and inappropriate activities. As ultimate decision-makers, regulators bear special burdens of responsibility to guard against bias and resist cooptation.

In all things political, regulation included, some animals are more equal than others. Special access can advantage or disadvantage any interest, but rare is the concern about inordinate influence from society’s alienated and disenfranchised. The considerable leverage of the few can quash the rights of many at society’s expense. The insidious consequence of distorting influence is that it subverts and jeopardizes the very institutions arising from the social compact to *balance* interests. The prudent regulator comprehends how dictums of due process and codes of ethics serve the common good, not just by providing legitimacy and equal protection, but by stemming institutional encroachment.

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46. Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 243, 319 n.392 (2005); see also FED. COMMUNICATIONS COMM’N, FACT SHEET (2001), [http://www.fcc.gov/ogc/admain/ex\\_parte\\_factsheet.html](http://www.fcc.gov/ogc/admain/ex_parte_factsheet.html).

47. BERNSTEIN, *supra* note 35; STIGLER, *supra* note 15. Even consumer advocates can fall to accusation of capture. See generally Pete Shuler, *The Damage Done, State Consumer ‘Advocate’ Quits*, CINCINNATI CITY BEAT, Nov. 12, 2003, available at <http://citybeat.com/gyrobase/Content?oid=oid%3A90723>.

48. GRANT MCCONNELL, *PRIVATE POWER & AMERICAN DEMOCRACY* (Knopf, 1966).

### C. *The Independent Commission*

Paralleling the ongoing consternation about “judicial activism” is a debate about whether regulators should be *more* independent or *less* independent, especially in relation to other institutions of and influences on policymaking. Do regulators simply interpret and apply the intentions of lawmakers, or do they have a mandate to formulate original policy as well?<sup>49</sup> The answer must be informed by the understanding that commissions and commissioners at once fill three equally essential and nonexclusive roles (Exhibit 2), the sum of which is greater than the parts.<sup>50</sup> In their *quasi-administrative* capacity, regulators interpret policy and apply technical expertise to the routines of rulemaking, implementation, and enforcement. In their *quasi-legislative* capacity, regulators craft policy, as they also inform and support policymaking by other bodies. In their *quasi-judicial* capacity, regulators make findings and rulings in the context of particular cases and in accordance with established law and legal procedures.<sup>51</sup>

Role	Governance model	Role mode	Function	Procedural emphasis	Orienta-tion	Decision mode	Prod-uct
Quasi adminis-trative	Bureau-cratic	Expert	Imple-mentatio-n	Reactive	Outputs	Mana-gerial	Rules
Quasi legis-lative	Demo-cratic	Trust-ee	Formula-tion	Proactive	Out-comes	Political	Polic-ies
Quasi-judicial	Juro-cratic	Judge	Adjudica-tion	Protect-ive	Process	Delibera-tive	Orders

#### EXHIBIT 2. INSTITUTIONAL COMPLEXITY OF INDEPENDENT REGULATORY COMMISSIONS.

Invariably, policy “happens” in each of the conjoined arenas and is promulgated with each rule, policy, and order. Regulation can no more be separated from policymaking as it can be separated from politics.

The administrative, legislative, and judicial models of governance are a study in complements, contrasts, and contradictions. The complex coexistence

49. For a finding that a commission is narrowly constituted as a creature of the legislature and bound by statutory law, see *Union Carbide Corp. v. Pub. Serv. Comm’n*, 428 N.W.2d 322 (Mich. 1988).

50. See generally CHARLES F. PHILLIPS, *REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE* (Arlington, VA: Public Utilities Reports 1993).

51. See generally JERRY L. MASHAW, RICHARD A. MERRILL, & PETER M. SHANE *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM; CASES AND MATERIALS* 60 (West 3d ed. 1992). NATIONAL ASSOC. OF REGULATORY UTIL. COMM’R, *CODE OF ETHICS FOR MEMBERS OF THE NAT’L ASS’N. OF REGULATORY UTIL. COMM’RS* (2008), <http://www.naruc.org/About/CODEOFETHICSFORMEM072308.pdf>.

of institutional roles under one roof is inherently complicated and cannot be disentangled without losing more than would be gained. Politics and controversy can attach to any of the roles and their intersection. The bureaucratic role invites attention to agency effectiveness and efficiency, the legislative role invites attention to institutional autonomy and authority, and the judicial role invites attention to the boundaries of activism and potential conflicts with the other roles.

Just as commissions must find ways to blend roles structurally, commissioners must find ways to blend roles individually. The conundrum for regulators is far more nuanced than choosing which hat to wear on a given day. The regulator must be an interpreter of law, a crafter of policy, and a finder of fact, enduring a sanctioned condition of multiple personality where experts must think like politicians, politicians must think like judges, judges must think like experts, and so on. Shaping policy in a given direction cannot be perceived as prejudging a contested case, just as a specific ruling does not necessarily constitute a statement of policy applying to all circumstances.

Some regulators may find it vexing to adopt new rules of conduct and unfamiliar modes of decision-making and conflict resolution. The technically oriented may need to acclimate to the sometimes perplexing demands of legal procedure. The politically oriented may need to limit some styles of interaction and forego the inclination to broker solutions. The legally oriented may need to appreciate the contrast between the subtleties of policymaking and the absolutes of conventional litigation. The prudent regulator finds ways to fulfill all three roles with agility and reconciles the tensions among them by a common focus on the public interest.

#### *D. The Judicial Form*

In regulation, the judicial role enjoys special standing. It is no accident that the National Association of Regulatory Utility Commissioners (NARUC) embeds the scales of justice in its logo and follows judicial conventions (*e.g.*, commissioners are deferentially addressed as “The Honorable”), that new regulators attend judicial training, and that agency missions, procedures, and codes of conduct are often modeled after those pertaining to courts and judges. The NARUC’s Code of Ethics avow that “[a]n honorable Commissioner of high integrity is indispensable to justice in discharging the responsibilities of the Commission”<sup>52</sup> and echoes the judicial creed that commissioners should be “unswayed by partisan interests, public clamor, or fear of criticism.”<sup>53</sup>

At its core, regulation by independent commissions is distinctly and undeniably judicial in form, function, and character.<sup>54</sup> The public-interest doctrine is owed to regulation’s common law heritage and more than a century of constitutional affirmation, with the Supreme Court as ultimate arbiter. The

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52. National Assoc. of Regulatory Util. Comm’r, Code of Ethics for Members (2008), <http://www.naruc.org/About/CODEOFETHICSFORMEM072308.pdf>.

53. *Id.*

54. Kansas experimented explicitly with a judicial form of regulation. Brian J. Moline, “*Judicial Regulation in Kansas: The Rise and Fall of the Court of Visitation and the Industrial Court*,” J. OF THE KANSAS BAR ASSOC. Vol. 63, No. 10, 28-36 (December 1994).

statutory basis for regulation is replete with judicial references that prescribe regulatory responsibilities and standards of review. Principles of justice are foundational to regulatory practice (as in “just and reasonable” rates and returns). While commissions may not embrace all of the formal trappings of civil and criminal courts, they abide by the tenets of administrative law and procedural due process, including rights of appeal to the judiciary. Statutes and codes of conduct frequently include requirements designed to “preserve the quasi-judicial function of the commission.”<sup>55</sup> The regulatory process, like the judicial, requires findings of fact and law in the tenacious pursuit of not simply resolution but *truth*. Administrative law judges or hearing officers assist the effort. The literal designation of commissioners as judges is rare,<sup>56</sup> but judicial demeanor is a worthy aspiration for all those in service to regulation.

Independent regulation in its quasi-judicial form is admittedly institutionally conservative, but remains essential in the context of persistent market failure.<sup>57</sup> Although sometimes disdained for contributing to “regulatory lag,” the model’s procedural protections may be especially useful in the face of political pressure and other forms of influence. Litigative processes place boundaries on conduct and lay a foundation for equal protection. Adjudication and appeals help clarify policies and establish legal precedents. Not all matters of contemporary regulatory policy lend themselves well to the traditional judicial model and the parameters of contested proceedings.<sup>58</sup> While not supplanting formal process, alternative dispute resolution (ADR) methods have arisen in regulation as elsewhere to improve conflict management, as well as to promote more efficient and effective policy development and adaptation.<sup>59</sup> No matter the process, however, responsibility to the public interest remains with the regulator.

#### *E. Role Models for Regulators*

Each of the three regulatory roles inspires a different role model for policymaking. Regulators might be characterized primarily as *experts*. Given modern challenges and complexities, the New Deal conception of a more technocratic approach to independent regulation might appeal. Technical competency in the commission staff is a valuable asset in policy formulation and implementation. A technocracy might consign regulation directly to detached scientists, engineers, and other experts perhaps under the direction of a single administrator with a technical pedigree. They would speak the language of utilities and understand the workings of utility systems, infrastructure, and networks, and would likely conceive of the public interest in the metrics of their principal academic disciplines. The idea has face value, chiefly in terms of the prospect of lesser influence and greater efficiency, but its appeal would likely fade with the realization that political and legal tools used to guide process,

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55. MINN. STAT. § 216A.037 (2007); *see also* MINN. R. 7845.0500 (2008).

56. Judges preside at the Virginia Corp. Comm’n.

57. Market failures or imperfections include but are not limited to monopoly, market power, externalities, neglect of the commons, and undesirable social or distributional outcomes.

58. Facility siting and resource management policies provide good examples.

59. ENERGY ADR FORUM, USING ADR TO RESOLVE ENERGY INDUSTRY DISPUTES: THE BETTER WAY (October 2006), <http://www.energyadrforum.com/doc/EnergyADRForumReporOct2006.pdf>.

effect compromise, and muddle through no longer apply. What might be gained in technical expertise would be more than offset by the sacrifice of democratic ways and the system of justice that sees to their perpetuation.

Concerns about policy outcomes suggest a role model that is more politically oriented and populist to ensure that regulators are responsive and accountable to core constituencies. Both elected and appointed commissioners might be characterized as *trustees* in accordance with the theory of representative democracy that calls for public officials to apply principled judgment in policymaking.<sup>60</sup> Contrasted with administrative agencies, commissions are impaneled to provide for collective deliberation, as well as diversified perspective across geopolitical, demographic, professional, and other criteria. Like technocracy, a more political orientation presents risks and trade-offs. Some time-honored political tools, such as compromise and consensus, can serve policymaking well; others, such as pandering and placating, can do harm. Policy decisions in the public interest might be stifled by political resistance or possible retribution from the public at large, public officials, or powerful special interests. The inequality of advocacy and influence in political exchange underscores the need for rules, as well as rules for making the rules.

The value of the judicial model is found in the institutional legitimacy of courts, the protective procedures of administrative law, and the wisdom, demeanor, and trustworthiness of *judges*. Judicial standards ensure fair proceedings and guard the decision process against partisanship, clamor, and criticism. Judging may seem less politically demanding than legislating, depending on the scope and controversy of the issues. Litigation is narrow and positional; legislation is broader and pluralistic. Although case-specific decisions may be a less explicit form of policymaking, they are not necessarily less consequential and they can be precedential. From conventional rate cases to contemporary disputes, each regulatory ruling allocates burdens and benefits, requires discretion, and is subject to policy debate. The traditional role model of jurist may not equip regulators for making policy that is both consistent with the public interest and responsive to legitimate political considerations. Their institutionalized policymaking role releases regulators from conventions of judicial restraint and the relatively high threshold of justification pertaining to judicial activism.<sup>61</sup> All forms of policy activism provoke politics. Activism in pursuit of the public interest, within the boundaries of accountability, is nonetheless essential to the job of regulator.

Each role model for regulators is useful, but each is also wanting, particularly if misinterpreted or narrowly conceived. The regulator certainly can be neither a technician, nor a power broker, nor a dispassionate arbiter. The prudent regulator embodies a hybrid institutional form that borrows the best

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60. The delegate form of representative democracy is reminiscent of legislative ratemaking and political trappings that independent regulation was meant to replace. Given their size, neither can the commissions aspire to proportionate representation. The selection process for regulators also does not necessarily foretell the democratic theory to which individual commissioners subscribe.

61. *Democracy and the Court* (Aspen Institute broadcast July 7, 2007) ([http://fora.tv/2007/07/07/Justice\\_Stephen\\_Breyer\\_Democracy\\_and\\_the\\_Court](http://fora.tv/2007/07/07/Justice_Stephen_Breyer_Democracy_and_the_Court)) (Justice Breyer elucidates the necessity of the Court to take action, on constitutional grounds, when other institutions fail in their duties. Breyer also analyzes the provocative principle that those least favored in life should be most favored in law.)

elements that cultural role models attach to the higher callings of *experts*, *trustees*, and *judges*. Regulators can draw strength from each model in their public-interest quest. A theoretical advantage of this conception is that each role is seen as complementing and reinforcing the others in terms of policy emphasis, intellectual approach, and mechanisms of accountability.

The prudent regulator takes “a principled approach to regulation, an empirical approach to regulatory analysis, and a reasoned approach to structural and regulatory change.”<sup>62</sup> The prudent regulator is an expert who examines evidence and applies technical perspective to policy choices. The prudent regulator practices a specialized jurisprudence and enjoys a degree of courtesy and deference from other policymakers, including the judiciary proper. The prudent regulator dispenses a justice both enlightened by knowledge and mindful of the general will. The prudent regulator is not formulaic, pedantic, or rule-bound, but adopts a judicial demeanor, respects the rule of law, and is uncompromising of due process. The prudent regulator exercises discretion calculatedly, judiciously, and with reasonable consistency. The prudent regulator takes account of public preferences, values, and acceptance, and is benevolent toward the people and communities they serve. The prudent regulator makes policy while being circumspect about regulatory activism and taking measure of their place within the equilibrium of political power and its essential system of separations, checks, and balances. The prudent regulator perceives the public interest not through a veil of ignorance but of insight.

#### F. *The Independent Staff*

Regulation depends not only on independent commissioners, but an independent staff in the tradition of professional civil service. A credentialed, experienced, and independent staff adds substantially to the value and quality of the regulatory process. The staff is a resource to experienced and especially new regulators. Often serving much longer than commissioners, the career staff brings both institutional memory and technical knowledge to bear on complex issues and consequential decisions.<sup>63</sup> A modern paradox found in the increased reliance on markets, including forms and degrees of “deregulation,” is the need for greater regulatory capacity. Among the many stakeholder participants in the regulatory process, the dedication of the professional staff to the public interest makes them “first among equals.” The staff can help redress the resource leverage of utilities, provide alternatives to interest-based positions, and triangulate the record in support of balanced decisions. The prudent regulator knows their ultimate responsibility for decisions, while also valuing the input of an independent staff that tells commissioners what they need to know, not just what they want to hear.

Commission staff expertise is central to all aspects of regulatory policymaking, although staff roles and the associated rules of conduct can vary by jurisdiction, by subject matter, by type of proceeding (*e.g.*, a rulemaking or

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62. INSTITUTE OF PUBLIC UTILITIES, MICHIGAN STATE UNIVERSITY, <http://www.ipu.msu.edu/research> (last visited Sept. 13, 2008).

63. *Demographics*, *supra* note 16 (as of February 2008, the commissioners in office had served an average tenure of 4.5 years.)

contested case), and over time (that is, a staff member serving in one capacity for one proceeding may play a different role in another). *Administrators* manage the agency and help implement policy; *advisors* assist the commissioners in their various roles; and *advocates* appear before the commission as expert witnesses. Staff advocacy usually requires temporary or permanent organizational separation from commissioners, as well as procedural controls (*e.g.*, restrictions on *ex parte* communications), for reasons of due process and *mutual* independence. Staff analysts and witnesses should no more be cajoled, coerced, or intimidated as any other expert in an investigatory or adjudicatory process.

Alternative organizational and management structures define the commissioner-staff relationship. Direct control of staff by the chairman or commissioners, without an administrative intermediary, may jeopardize staff independence and invite internal politicization. Control of the management, staff, or other agency resources by an outside agency may invite external politicization. A few states have opted to strictly bifurcate the staff according to roles, in some cases locating advocates in another agency altogether.<sup>64</sup> The autonomy of staff advocates may be enhanced under this model, but care must be taken to maintain commissioner access to in-house technical expertise. Separation may also leave a vacuum in the “middle” of the decision record if no one is left to articulate and advance the public interest. In the consideration, design, and implementation of regulatory reforms, such capacity considerations are nontrivial.

An institutionally inherent, administratively complex, but *mostly healthy*, tension exists between regulatory commissioners and their professional staff; the relationship can be challenging, awkward, and at times exasperating, but is rarely irreconcilable. The multiple policymaking roles required of both commissioners and staff can be a source of conflict. The administrative norm of principal-agency defines the relationship for some functions (*e.g.*, policy implementation) but not others (*e.g.*, adjudication). The commission’s role is ultimately *authoritative* and the staff’s role is inevitably *subordinate*, but they share a common mission of service. With commission organizational cultures, the boundaries of staff independence are sometimes tested.

How commissioners perceive their role and that of staff may be at odds with how staff perceives its role and that of the commissioners (Exhibit 3).<sup>65</sup> Ideally, both will welcome a thoughtful counterpart in their pursuits and neither will settle for captive loyalty. Commissioners should expect more from staff than validation of autocratic declarations; staff should expect commissioners to come to their own conclusions deliberately and not just “rubber stamp” the recommendations made to them, including settlements negotiated by staff with other parties. Commissioners should value and utilize the experience, expertise, and impartial analysis of the staff, and appreciate the sensitivities that arise when

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64. Indiana, Minnesota, North Carolina, South Carolina, and Vermont provide examples.

65. Some members of the professional staff have also succeeded as commissioners, which affords them a unique perspective on these matters.

staff advice is not taken. Staff should always respect the commission's authority and avoid entrenchment, recalcitrance, or the appearance of subversion.<sup>66</sup>

		<b>Perspective</b>	
		<i>Commissioner</i>	<i>Staff member</i>
<b>Role</b>	<i>Commissioner</i>	I. How commissioners view their own role	II. How staff members view the commissioner role
	<i>Staff member</i>	III. How commissioners view the staff role	IV. How staff members view their own role

EXHIBIT 3. REGULATORY COMMISSIONER AND STAFF ROLES AND PERSPECTIVES.

The staff can best support the commissions by informing regulatory decision-making. Staff often advocate a single recommendation, but sometimes provide a range of defensible options. Most staff want to support the commission, but they may feel aggrieved when their positions do not prevail in a major proceeding or policymaking process to which substantial effort has been devoted. Commissioners can be considerate by avoiding censure from the bench, as well as by clarifying rulings, expectations, and policy directions. A “post mortem” of major cases and decisions can also be revealing. Staff positions can be adapted and refined in response to and support of evolving commission policy without compromising independence.

Agency tensions can be magnified by differences among the commissioners, partisan politics, personal agendas, and high-stakes policy, but effectively mitigated by patient and skilled administration. Commissioners and staff are both well served by placing their trust in experienced executive managers, whose role is critical in overseeing the inner workings of the agency, allocating resources to functional areas, and managing critical agency linkages. Managers may be more or less able to shield themselves and the professional staff from internal and external political forces, including arbitrary or politically motivated demotion or dismissal when they serve, as many do, at the pleasure of the commission.<sup>67</sup> Still, managers can and do help commissioners and staff members understand their respective roles; encourage the staff to sharpen skills and positions; provide opportunities for academic pursuits, professional development, mentorship, and socialization; solicit staff input on organizational and strategic matters; and promote constructive conflict management and adaptation. Particularly astute managers instill resiliency in the agency culture and show the impassioned how to disagree and move on. The prudent regulator appreciates the executive manager and the staff, and the value of high-functioning organizations to the regulatory process.

66. Commissions may be more or less willing to afford “academic freedom” to staff; staff members who publish are obligated to disassociate their views from those of their employers.

67. See, e.g., MASS. GEN. LAWS ANN. Ch. 31 § 41 (West 2008).

*G. Independence v. Indifference*

The public expects all public officials, including regulators, to serve them. The sovereignty of the people is foundational to the legitimacy of governments and support of the public is a necessary condition for successful policy adoption and effective policy implementation.

Elected or appointed, the independent regulator is neither apolitical nor politically indifferent to the public. Regulators must be sensitive and responsive to their various constituents, perhaps especially the ratepayer-voter. Ever-shifting public values and preferences are expressed through political processes and factored into the high calculus of the public interest. Regulatory policies that disregard or defy the general will are antithetical to the public-interest doctrine. Regulatory commissions, according to Roosevelt, must be a "Tribune of the people... getting the facts and doing justice to both the consumers and investors in public utilities."<sup>68</sup>

Regulatory decisions are shaped by public opinion in a variety of ways. Opinions can be measured in votes and in the policies of duly elected representatives, which involve them in commission statutory authority and both executive and legislative oversight. Parties represent voters in the political process and advocates represent various groups in the regulatory process. Open proceedings allow public observation and public hearings provide a platform to ensure that commissioners are in touch with public sentiment, however amorphous. Regulatory discretion in part involves assigning relevance and weight to the opinions expressed in both evidentiary and public hearings.

In matters of regulation, public needs and wants often do not align. Rate cases are archetypical. The time-honored criteria for utility ratemaking include fairness, interpretability, and practicality.<sup>69</sup> If asked, the public invariably would prefer lower to higher rates for service, but the regulator must find a rate that strikes the constitutional balance between ratepayers and shareholders and ensures service safety and adequacy.<sup>70</sup> Public understanding and acceptance are weighed against other criteria, including revenue recovery, efficiency, and stability. Balance must also be found in the myriad of other policy choices that regulators are charged to make.

Regulators make policy in the din and disharmony of clamor and criticism; politics turn up the volume. Few regulatory decrees appease all interests on all issues. Much of regulation is about tradeoffs and allocation decisions, where controversy and clashes are inevitable. Boisterous and strident advocacy may come from large groups, but also from smaller groups that are not necessarily representative. Some opinions may be unspoken and some voices unheard. Although giving in to pressure from the public and its many representatives may afford the path of least resistance, the public interest sometimes calls for decisions that are asynchronous with expressed public preferences. Regulatory decisions in the public interest frequently are unpopular and met with some political resistance, although still regarded as legitimate and necessary. The

68. Roosevelt, *supra* note 11.

69. JAMES C. BONBRIGHT, *PRINCIPLES OF PUBLIC UTILITY RATES* (Columbia Univ. Press 1969).

70. See, e.g., ME. REV. STAT. ANN. tit. 35-A, § 3203 (1997).

prudent regulator understands that the public interest must be informed by public opinion, but not defined by it.

#### *H. Independence v. Isolation*

Regulation cannot take place in a vacuum and independence does not necessitate lonely isolation or barring all avenues of input from stakeholders, the public, and the polity. Regulators can nourish their intellectual curiosity by perusing reputable publications and attending open, inclusive, and balanced educational and professional forums. Independent and critical sources of information, such as neutral academic studies and colloquia, may have distinct value. Although commission decisions must be supported within “the four corners” of an evidentiary record, based on merits and constructed in accordance with due process, methods are available for giving consideration to extra-record information.

The interaction of regulators and regulated presents a greater challenge and is subject to far greater scrutiny. Policies adopted the New Hampshire Public Utilities Commission speak to the complicated relationship of regulated and regulator resulting from “the ongoing need for interaction and the sharing of information in blended professional and social situations,” the benefit to the public interest that derives from maintaining “good working relationships,” and how the commission “endeavors to influence ethical behavior through education and by requiring the highest standards of professional and personal decorum in the conduct of the State’s business.”<sup>71</sup> Regulators are judged not just by the company they keep, but how they keep it. Establishing clear ground rules and expectations can help ensure that commingling in local or national forums promotes honest education and exchange and avoids the unseemly appearance of fraternization.

New regulatory challenges may call for new methods for education, exploration, and exchange. Much of modern regulation is about the complex and dynamic coexistence of emergent markets and governmental oversight. Regulation has morphed substantially from its original role as absolute substitute or proxy for competition to adopt new roles in market facilitation and monitoring. For some market segments, the regulator’s reach has been shortened. Policy demands associated with special urgency or rapid economic and technological change may not be suited to the plodding pace of adjudication. Designing market rules is information and interest intensive, and may call for participatory and collaborative approaches. The inevitable conflicts that arise in markets might also benefit from the modified procedures of alternative dispute resolution.

Adaptation and modernization are not cause to abandon regulation’s fundamental principles. Technical complexity does not justify exclusion of interests or exemption of issues from healthy and open public debate about values, preferences, and priorities. Many voices should have the chance to speak to public policy, not just those who most often bend the ears. More inclusive processes for policy development are more demanding, but also fairer and better

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71. NEW HAMPSHIRE PUB. UTIL. COMM’N, ETHICS POLICY (1996), <http://www.puc.state.nh.us/Home/AboutUs/ethics.htm> [hereinafter N.H. ETHICS POLICY].

informed. Diversity enriches the record by which policy decisions are made. Commissioners are well advised to place a priority on engaging in constructive dialog with policymakers in sister agencies (*e.g.*, environmental and economic development offices) and with their peers in other state and federal agencies with which they share geopolitical boundaries, markets, or jurisdiction. Networking and diplomacy can bolster confidence. Information sharing and collaboration can empower regulators, enhance decision-making quality and independence, and facilitate policy harmonization. The prudent regulator is neither isolated nor insular, but neither are they indiscriminate about input and interaction.

### *I. Enhancing Independence*

Independent regulation rests on the shoulders of independent regulators. Enhancing the independence can be accomplished by various means. The institutional form of the commissions and their place within government, along with their statutory authority, organizational structure, and composition, speak directly to their independence. Regulatory agencies may be born of constitutional, executive, or legislative origins that confer more or less autonomy. Informing the appointment, reappointment, and electoral process about the demands of the position, both intellectual and institutional, is centrally important. Statutorily protected appointments and longer terms would enhance independence from political processes, and allow commissioners to ascend regulation's formidable learning curve and become more effectual.<sup>72</sup> Enlisting qualified and committed candidates to serve is centrally important. Both recruitment and retention require adequate compensation. Although the process cannot be depoliticized, judicial selection processes may provide a useful model. A meritocratic approach would use screening methods, nominating processes,<sup>73</sup> and possibly eligibility criteria or guidelines.<sup>74</sup> Nominees might also be appraised in a process modeled after the rankings of judicial nominees by the American Bar Association, though not confined narrowly to judicial competencies.<sup>75</sup>

Once on the job, commissioners should be socialized into the roles of expert, trustee, and judge and supported with academically grounded continuing education that includes meaningful training in regulatory principles, judicial skills, and ethics. Ethics training must extend beyond reviewing the rules to considering institutional implications. Regulators should also have access to independent information and applied research that comports with academic standards for integrity and rigor, including the use of established methods of

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72. A caveat from the "capture" theory of regulation is that longer serving commissioners may become more independent politically, but less independent from industry because perspectives begin to converge.

73. In Ohio, a Public Utilities Comm'n Nominating Council submits to the governor a list of individuals it deems qualified to serve as commissioners. OHIO REV. CODE ANN. § 4901.021 (West 2008). A similar process is used for the Florida Public Service Comm'n. FLA. STAT. § 350.031 (2008).

74. Minnesota law provides that "[t]he governor when selecting commissioners shall give consideration to persons learned in the law or persons who have engaged in the profession of engineering, public accounting, property and utility valuation, finance, physical or natural sciences, production agriculture, or natural resources as well as being representative of the general public." MINN. STAT. § 216A.03 (2008).

75. See generally AMERICAN BAR ASSOC., STANDING COMM'N ON THE FED. JUDICIARY RATINGS, (2008), <http://www.abanet.org/scfedjud/ratings.html>.

inquiry and peer review. University centers and other third-party neutrals can be used to facilitate the exchange of ideas in educational and policymaking processes. Professional associations can provide standards, support, and advice; they might also be encouraged to self-regulate and impose sanctions for conduct unbecoming the profession.<sup>76</sup> Finally, stringent exit policies for regulators regarding direct or indirect engagement with regulated companies after their service help ensure independence during their service.<sup>77</sup>

#### IV. REGULATORY ETHICS

Ethical behavior is an essential condition of independent regulation. The vast majority of public officials, regulators included, are worthy of the positions of trust that they occupy. All too frequently, however, flaws of character, failures of judgment, and nefarious acts rise to the surface as unfortunate reminders of hazardous morals and why ethics matter. Ethical violations today may not be more frequent, but they are probably subject to more publicity and investigation.

By virtue of their civic responsibilities, and the impact of their work, expectations of regulators are especially demanding: “[t]he maintenance of *unusually high* standards of honesty, integrity, impartiality, and conduct... is essential to assure the proper performance of the [Government business] and the maintenance of confidence by citizens in their Government.”<sup>78</sup> The New Hampshire ethics policy recognizes how the regulator’s alternative policymaking roles can present distinct ethical challenges:

The essential conflict stems from the need in varying situations to act as, among other things, an impassioned advocate, an unbiased arbiter, an informed adviser, an aggressive investigator or a forthright mediator. Because of these multiple roles, Staff may appear to be an ally of a utility one day and an opponent of a utility the next.... Commissioners and Staff must therefore scrutinize their conduct to be assured that they are fair and even handed, neither too familiar nor too adversarial.<sup>79</sup>

Changing roles, new methods and approaches, and an ever expanding array of issues and interests may call for the rules of engagement to be refined and clarified, but not relaxed. If anything, higher stakes call for more caution and care. While some rules may be *situational*, and their application to specific parties may be *conditional*, the imperative of ethical conduct for all participants in the regulatory process is *absolute*. Justice Potter Stewart wisely defined ethics as “knowing the difference between what you have a right to do and what is right to do.”

Ethical behavior is about honesty, integrity, and an abiding respect for codes of conduct. Ethics are often associated with conflicts of interest because conflicts may affect judgment or tempt abuse of position for political or personal

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76. Rules and procedures exist for disbarment, but not “de-commissioning” of this sort. See AMERICAN BAR ASSOC., STANDING COMM’N ON PROF’L DISCIPLINE, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, (2008), <http://www.abanet.org/cpr/disenf/rule25.html>.

77. Strengthening current requirements by extending “stay-out” periods, broadening prohibited conflicts to include all relevant interests, and providing transitional assignments in the public sector might be considered.

78. 18 C.F.R. § 706.101 (1996) (emphasis added).

79. N.H. ETHICS POLICY, *supra* note 72.

gain.<sup>80</sup> Conflicts are not uncommon;<sup>81</sup> acting upon them may constitute the impropriety. Conflicts may be managed through full disclosure, removal, or mitigation (*e.g.*, recusal), but any semblance of conflict tends to cast doubt on integrity and credibility. In public life, perception becomes reality and as relevant as the letter of the law; even the Court acknowledges: “justice must satisfy the appearance of justice.”<sup>82</sup>

Knowingly or not, regulators routinely face moral and ethical quandaries. Partisan loyalty is tested, reciprocity is expected, and political pressures are felt by commissioners and also by the professional staff. Outside information makes its way in, and inside information makes its way out. Electronic mail is exchanged, conversations take place, and revelations are advertently and inadvertently shared. Friendships and romances form and indiscretions occur. Private parties and their associations and agents host events of all kinds that, in lobbyist parlance, enable “troughing” by guest public officials. Travel and speaking engagements are arranged. Meals, entertainment, tickets, invitations, gifts, donations, endorsements, campaign contributions, and employment opportunities are made ready. Not every circumstance is unambiguous and not every encounter constitutes compromise, but the discerning find ways to navigate their way.

Independence and ethics must be guarded vigilantly precisely because so many dubious manners of influence are inconspicuous. Flagrant ethical violations, by comparison, reflect the conscious choice *by both the corrupter and corrupted* to cross the line to the “dark side,” leaving little doubt as to either motive or guilt. Corruption by coercion or capitulation is probably rare. These breaches can more often be described in terms of a willful *quid pro quo*, a duplicitous transaction that sells out the public interest for a price measured in private gratification or enrichment. Culpability belongs to all parties to the deal, regardless of instigation. A parsimonious model explains fraudulence by the confluence of opportunity, incentives or pressure, and attitude or rationalization.<sup>83</sup> Opportunities and pressures are ever present in modern life, but rationalization marks the collapse of conscience that makes way for perpetration. For large and seemingly small infractions alike, excuses are always expositive. Few want to believe, and none will admit, that they can be corrupted or that their loyalty can be bought. Rationalization is made easier by other character flaws, including narcissistic, mendacious, or compulsive proclivities, as well as feckless conformity. Some rationalizers may possess a false sense of

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80. On conflicts of interest, *see generally* OFFICE OF THE LEGAL SERV. COMM’R, *New Look at Conflict of Interest*, WITHOUT PREJUDICE (2003), available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll\\_olsc.nsf/pages/OLSC\\_wp29](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_wp29); and TELECOMMUNICATIONS. MGMT. GROUP, INC., INFO. FOR DEV. PROGRAM & INT’L TELECOMM. UNION, 6.5 ETHICS RULES & CONFLICTS OF INTEREST (2008), <http://www.ictregulationtoolkit.org/en/Section.2049.html>.

81. All regulators, for example, are utility customers who most likely take service from companies they regulate.

82. *Offutt v. U.S.*, 348 U.S. 11, 13 (1954). Quote commended by Lynn Hargis.

83. Known as the “fraud triangle,” this model is described in Auditing Standards Board of the American Institute of Certified Public Accountants (AICPA). AUDITING STANDARDS BD., AM. INST. ON AUDITING STANDARDS, AU SECTION 316: CONSIDERATION OF FRAUD IN A FINANCIAL STATEMENT AUDIT (2002), <http://www.aicpa.org/download/members/div/auditstd/AU-00316.pdf> [hereinafter AUDITING STANDARDS].

impunity or entitlement by virtue of their position and perhaps the inadequacy of their compensation. Some may be dismissive while others may be defensive or indignant. Some may deflect or obfuscate while others are simply “caught unaware.” Human error in the form of ignorance of or confusion about the rules can be rationalized no more than direct violations.

Corrupt bargains exact the highest of transaction costs. Given the weighty obligations of regulators, misconduct has implications beyond individual acts of selfishness, recklessness, or criminality. Ethical indiscretion is not just virtue lost but an affront to the public trust and an insult to the public interest.

#### A. *Imbuing Ethical Behavior*

Ethical behavior is effortless for those with a genuine fidelity to the public interest, as affirmed by oaths of office. The various mechanisms that ensure institutional independence and accountability also hold individuals accountable. General and agency-specific statutes, policies, and codes of conduct spell out the particulars of acceptable behavior and are reinforced by authoritative oversight and enforcement. An informed and engaged public, and a smart and watchful media, both armed by requirements for openness and freedom of information, provide oversight as well. Civil and criminal penalties for noncompliance provide for deterrence, as well as punishment.

Inculcating ethics is a matter of organizational priority and salience. Regulators can raise the ethics bar for themselves. The strategic plan developed by the Nevada Public Utilities Commissions pledges that “[t]he Commissioners will exhibit the highest standards of professional conduct, carrying out their duties with honesty, integrity and dedication to public service.”<sup>84</sup> The Missouri Public Service Commission promises to “provide an efficient regulatory process that is responsive to all parties, and perform our duties ethically and professionally.”<sup>85</sup> The New Hampshire Public Utilities Commission vows “[t]o perform our responsibilities ethically and professionally in a challenging and supportive work environment.”<sup>86</sup> The FERC seeks to “maintain the highest level of professionalism and an environment of fairness, trust, respect and honesty.”<sup>87</sup>

Ethical regulators lead by example. Learning when and how to “just say no” is an instrumental skill for managing some situations, but one that does not come easily. The unwavering commitment to ethics must permeate the agency and its many processes, with commissioners and staff working together to foster a compliant environment. Commission administrators play a critical role in establishing and implementing agency ethics policies and procedures, including steps for reporting suspicions, protecting whistle-blowers, and reprimanding offenders. Some agencies designate ethics officers or committees. Periodic

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84. NEVADA PUB. UTIL. COMM’N, STRATEGIC PLAN FOR FISCAL YEARS 2007-2012, <http://pucweb1.state.nv.us/PDF/Admin/StrategicPlan.pdf> (last visited Sept. 14, 2008).

85. MISSOURI PUB. SERV. COMM’N, MISSION STATEMENT, <http://www.psc.mo.gov/about-the-psc> (last visited Sept. 14, 2008).

86. NEW HAMPSHIRE PUB. UTIL. COMM’N, MISSION STATEMENT, <http://www.puc.state.nh.us/Home/AboutUs/mission.htm> (last visited Sept. 14, 2008).

87. FEDERAL ENERGY REGULATORY COMM’N, ABOUT FERC, <http://www.ferc.gov/about/about.asp> (last visited August 5, 2008).

ethics education may be required. Managers and staff may also be asked by state auditors to certify compliance with standards, demonstrate internal controls, and divulge questionable behavior suggestive of fraud.<sup>88</sup> Governmental ethics offices or commissions may provide oversight, as well as advisory opinions. A sign of priority, as well as the times, is the expanding network of available resources on ethics.<sup>89</sup>

Ethical confrontations test managerial skill and political will. The unspoken, unsung, and unenviable burden on executive managers to be the agency conscience and to police not only subordinates but superiors, presents the managers with an especially thorny ethical challenge in itself. Assuming a maternalistic role is stressful and looking the other way can be tempting when professional survival is at stake. Commissioners may also find themselves policing each other, informally or formally.<sup>90</sup> Ethical violations strain professional relationships and agency operations. Governmental accountability and transparency ensure that they will invite public attention. How ethical breaches are disclosed and resolved speaks directly to organizational fortitude and institutional resilience in the face of failings.

### B. *The Open Process*

Embedded in the democratic political culture is the principle that “the public’s business should be conducted in public.”<sup>91</sup> Transparency is valued in each of government’s administrative, legislative, and judicial spheres. Rules for transparency apply to institutions, but also are controlling of individual behavior. Backdoor deals, of any variety, defy the principles of open democracy and feed the public’s cynicism about undue influence and misconduct.

Open records and open meetings shine sunlight on political processes, including regulation. Right-to-know and freedom-of-information laws provide affected parties, the public, and the media, access to information, including rate case and other filings; utility financial reports; maps and data; and commission

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88. See generally COMPTROLLER GEN., GOV’T ACCOUNTABILITY OFFICE, GOVERNMENT AUDITING STANDARDS, GAO-07-731G 1 (2007) (Auditing standards for the public and private sectors have been revised post-Enron to address fraud and improve accountability); see also AUDITING STANDARDS, *supra* note 84.

89. The Ethics Resource Center provides many useful links at [www.ethics.org/resources/links-organizational-ethics.asp?aid=1008](http://www.ethics.org/resources/links-organizational-ethics.asp?aid=1008), including the United States Office of Government Ethics at [www.usoge.gov/](http://www.usoge.gov/).

90. In 2003, four members of the Arizona Corp. Comm’n called on a fifth member to resign or face potential impeachment, citing a “pattern of misconduct” that stood to “undermine the public’s confidence” in the agency. Particulars included a sixty million dollar civil judgment against the commissioner for attempted influence in a bidding war, as well as concerns about his involvement in a securities case and charges of libel. *Commissioners call on Irvin to resign*, PHOENIX BUS. J., Mar. 18, 2003, available at <http://www.bizjournals.com/phoenix/stories/2003/03/17/daily26.html>; *Southern Union Co. v. Southwest Gas Corp.*, 425 F.3d 1001 (9th Cir. 2005). In 2005, the Minnesota Pub. Util. Comm’n fined a former chair for negotiating a job with a company doing business in the state and also billed the company for the cost of the investigation. A second investigation focused on inappropriate communications. Leslie Suzukamo, *Minnesota Commission Fines Former Chairman for Taking Oregon Telephone Job*, PIONEER PRESS, Oct. 7, 2005, available at [http://www.redorbit.com/news/technology/264659/minnesota\\_commission\\_fines\\_former\\_chairman\\_for\\_taking\\_oregon\\_telephone\\_job](http://www.redorbit.com/news/technology/264659/minnesota_commission_fines_former_chairman_for_taking_oregon_telephone_job) (PUC Order Dated 10/7/2005).

91. See generally BURT A. BRAVERMAN & FRANCES J. CHETWYND, INFORMATION LAW: FREEDOM OF INFORMATION, PRIVACY, OPEN MEETINGS, OTHER ACCESS LAWS (Practising Law Institute 1985).

studies and reports. Parties to cases can exercise rights of discovery through data requests and interrogatories. In the electronic age, information is more available and more accessible. Access to information is weighed against propriety and security. To some extent, the potential for discovery may have a chilling effect on communications and documentation (*e.g.*, memoranda, audit papers, and draft reports). Although access technically may be equal, knowledge about information's availability, the resources to acquire it, and the capacity to use it are highly variable.

Open meetings allow external observation of the regulatory process, including commission conferences, hearings, and deliberations. Commissions normally must provide ample notice so that interested parties may attend. The rules often limit commissioner-to-commissioner communications, defining "meetings" narrowly and restricting, for example, any assembly of a commission's quorum. Open meeting rules may permit *en banc* consideration of sensitive matters related to national security, litigation, or personnel; labor or real-estate negotiations; meetings with agency auditors; discussions that would violate privileges or breach confidentiality; and deliberations for major pending decisions that have extraordinary potential to move financial markets. Educational and professional conferences attended by commissioners also are generally exempt. Meetings between decision makers and interested parties, and other forms of communication, are further governed by *ex parte* regulations. The public is always wary of closed-door meetings between the regulator and the regulated.<sup>92</sup> The rationale for *pre-filing* meetings is to scope issues, clarify procedures, and coordinate scheduling or other logistics before parties become parties, but these encounters invariably appear to favor the filing entity by giving it an early opportunity to proffer merits. Meetings with third parties might technically be allowed, but also appear to evade the spirit of openness and balance. Possible remedies are to make pre-filing meetings open and inclusive, or to include managerial staff but exclude decision-makers from participation.

Operating under the public's watchful eye has its drawbacks, including chilling effects on discourse, intimidating effects on participants, and possibly distorting effects on decisions. Openness may be more comfortable in some political cultures and for politically experienced commissioners, including elected commissions and those with longer tenure. Openness can dampen the depth and candor of dialog and lengthen the learning curve. Compliance can add costs and reduce organizational and decision-making efficiency. Serial, proxy, or staff-mediated communications and brokering may be used to circumvent restrictions on direct contact. Decision makers may posture or play to the audience (the parties, the public, and the media); with time they may also become overexposed or overly familiar to constituents. A reasonable compromise, in keeping with the quasi-judicial form and permissible in some jurisdictions, may be to allow closed deliberations only among commissioners and ideally only once evidentiary records are closed. According to Jones, openness may be commendable but still "ill-suited to the quasi-judicial task of public utility regulation" because it affects the quality of both process and

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92. The Vice President prevailed in the Comptroller General's challenge to his procedural approach to National Energy Policy in *Walker v. Cheney*. 230 F. Supp. 2d (D. D.C. 2002).

outcomes, including the contrarian effect of advantaging special interests (who attend open meetings) over the general public (who do not).<sup>93</sup>

As watchdogs of democracy and government, the media are understandably sensitive about openness. In a world where nothing is “off the record,” the media may be regarded as friend or foe. Controversy and politics tend to draw the media’s attention, and intensive coverage tends to raise the political pitch. The new media can be democratizing and lower the cost of information and access, but can also be relentlessly revealing. Minor issues can be spun into major stories and spread virally. Seasoned public officials understand the media’s power to both inform the public and exact accountability.

Openness is a reasonable price of democracy that generally serves the institution of regulation well, especially with respect to accountability in the face of unpopular decisions and difficult policy choices. Some concessions to the judicial model may be in order, but for much of the business of regulation, the loss of convenience and comfort is negligible when compared with the potential gain of trust that comes with a high degree of openness. The prudent regulator accepts willingly the burdens and obligations of due process and open government for the value and legitimacy they bring.

### C. Codes of Conduct

Federal, state, and local public officials are obligated to abide by the rules attached to their positions of authority. No universal manual of practice exists for public utility regulators, although principled guidance for conduct can be found in the five canons adopted by the NARUC in 1977 (with elaboration): a commissioner should uphold the integrity of the commission; a commissioner should avoid impropriety and the appearance of impropriety in all activities; a commissioner should perform the duties of office impartially and diligently; a commissioner may engage in activities to improve regulation and administration; and a commissioner should regulate his or her outside activities to minimize the risk of conflict.<sup>94</sup>

The particular rules of conduct and exceptions to them can vary widely by jurisdiction, as well as type of proceeding.<sup>95</sup> For most commissions, restrictions on behavior are codified by constitutions, statutes, and administrative rules, some of which apply generally to public officials and some designed specifically for regulators. For many participants in regulation (such as attorneys, accountants, engineers), reinforcement is provided by professional self-regulation in the form of established codes of conduct, educational requirements, and the potential for penalties, including disbarment or expulsion.<sup>96</sup> Statutes and rules also specify procedures for filing complaints and imposing sanctions.

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93. Douglas Jones, *Utility Oversight in the Sunshine: Who Benefits?*, F. FOR APPLIED RES. AND PUB. POL’Y 7 no. 2 (Summer 1992).

94. CODE OF ETHICS FOR MEMBERS OF THE NAT’L ASSOC. OF REG. UTIL. COMM’RS, (1977), <http://www.naruc.org/About/CODEOFETHICSFORMEM072308.pdf>.

95. See generally 5 C.F.R. § 2635 (1992).

96. See generally Brian J. Moline, *Ethical Dilemmas for the Kansas Government Lawyer*, 5 KAN. J. L. & PUB. POL’Y, No. 1, 105 (1995).

The rules of conduct for regulatory commissioners and members of the staff generally fall within three areas: conflicts of interest, communications, and corrupting influence. High crimes, misdemeanors, and acts of obvious immorality that fall under criminal and civil law and social mores, constitute a fourth area of note. These transgressions reflect risky behavior and poor judgment, and justify unequivocally the loss of public position.

*Conflicts of interest* arise from private interests or duties that might compete with the regulator's obligation to the public interest and impede the fair performance of duties. Conflicts jeopardize both the reality and appearance of impartiality in the execution of official duties. Financial disclosure requirements are required of commissioners, and sometimes members of their immediate family, to ensure that they do not have a material stake or other pecuniary interest in a regulated business.<sup>97</sup> North Carolina commissioners, for example, submit to the State Board of Ethics a statement of economic interest known as the "Long Form."<sup>98</sup> Misdemeanor charges and monetary penalties apply to late or incomplete filings; felony charges and disciplinary action apply to false information. Regulators normally are prevented from owning stock or otherwise investing in regulated companies or other companies whose business interests may be affected by commission policies or decisions. New commissioners may be required to divest certain investment holdings before taking office; sitting commissioners may face fines for noncompliance.<sup>99</sup> For elected regulators, campaign finance rules and disclosures also apply.

Commissioners may be prohibited for a period of time from rendering decisions in cases where conflicts once existed. Disqualification or recusal due to conflict can hamper the regulatory process, notably for commissions with few members. Regulators usually are not permitted to hold other positions of public or private employment,<sup>100</sup> sit on governing or oversight boards, provide endorsements or promotions, or receive honoraria or other remuneration except for certain academic engagements (teaching and writing). Political, partisan, and fundraising activities may be limited as well. Regulators should avoid serving in an advisory or consultative capacity to any entity that has a direct or indirect interest in commission policy, including ancillary and unregulated entities, because of compromised objectivity or implied prejudice.

Regulators must abide by a number of rules related to *communications*. Many of these rules relate to transparency and the requirements for open meetings, open records, and freedom of information. Exceptions may be allowed, but often only with proper justification, notification, and disclosure.

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97. For a critique of disclosure policies and practices, see CENTER FOR PUBLIC INTEGRITY, STATE UTILITY COMMISSIONS FAIL TRANSPARENCY TEST (2005), <http://projects.publicintegrity.org/Content.aspx?src=search&context=article&id=758>.

98. NORTH CAROLINA STATE ETHICS COMM'N, <https://www.ethicscommission.nc.gov> (last visited Sept. 8, 2008).

99. See, e.g., *In re Henry M. Duque*, FPPC No. 00/593, (Cal. 2000).

100. Commissioners in Delaware and Vermont, with the exception of the Vermont Chair, serve on a part-time basis and may be employed elsewhere. DELAWARE PUB. SERV. COMM'N, DEPT. OF STATE, ABOUT THE DELAWARE PUB. SERV. COMM'N, <http://depsec.delaware.gov/about.shtml> (last visited Sept. 12, 2008); VERMONT PUB. SERV. BD., NOTICE OF PUB. SERV. BD. VACANCY, [http://www.state.vt.us/psb/site/employment\\_opportunities.stm](http://www.state.vt.us/psb/site/employment_opportunities.stm) (last visited Sept. 12, 2008).

Communications among the commissioners themselves may be subject to open meetings rules or reduced to conversations among no more than a majority of a quorum. Prohibitions on *ex parte* communications<sup>101</sup> between commissioners and parties of interest are meant to prevent undue influence on decision-making. Care must extend to contact with *interests* not formally identified as *parties*. Regulators may need to provide notice of pertinent extra-record information and additional rules may apply to how that information can be acquired and shared. Concerns about expressing bias also constrain communications. Regulators must be cautious about leaking or telegraphing information prior to a final decision, not just to parties, but to attentive observers (such as the trade press or financial analysts). The rules also extend to modern forms of communication (namely email), which may be unprotected by confidentiality or attorney-client privilege, readily discoverable, and potentially implicating..

The third general area concerns *corrupting influence*. The Oklahoma Constitution speaks directly to the point: “No corporation organized or doing business in this State shall be permitted to influence elections or official duty by contributions of money or anything of value.”<sup>102</sup> The rules here go straight to the obvious and odious *quid pro quo*. Their violation is the stuff of gossip, scandal, headlines, disrepute, and sometimes investigative proceedings leading to impeachment, resignation, removal, civil penalties, and even criminal charges. Public officials may instigate the crime or succumb to corrupting influence, but abuse of position always pertains in the choice to betray the public trust for personal advantage.

Like other public officials, commissioners and their families are almost always prohibited from accepting anything of tangible or intangible value from regulated interests or their representatives, or from other parties;<sup>103</sup> disclosure may be required for *offers* of gratuities. Wining and dining of public officials is always discouraged. Modest receptions and meals, discounts and fee waivers, token gifts, and sponsorship for speaking engagements may be allowed with prior approval, dollar-value limits, or other restrictions.<sup>104</sup> In the international context, personal gifts can present a special challenge for new regulatory regimes because of close social and professional networks and prevailing cultural norms.

Educational programs, conferences, and diplomacy all entail travel and compliance with travel policies that might include spending limits and pre-approval by oversight bodies. Sponsorship and even differential registration fees for government and industry can be scrutinized. Traveling to gatherings and

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101. See generally KRISTEN PAULING DOYLE, CONFLICTS OF INTEREST/EX PARTE COMMUNICATION WITH DECISION-MAKERS, [http://www.tml.org/legal\\_pdf/Conflicts-Interest.pdf](http://www.tml.org/legal_pdf/Conflicts-Interest.pdf) (last visited Sept. 13, 2008) [hereinafter DOYLE].

102. OKLA. CONST. art. IX, § 40. Ironically, the Oklahoma Corporation Commission was embroiled in a notorious six-year federal bribery investigation and sting operation that resulted in imprisonment for a former chair and a former general counsel, and an FBI award for Commissioner Bob Anthony. *Anthony Celebrates 10 Years at Corporation Commission*, J. RECORD, Jan. 11, 1999, available at <http://www.bobanthony.com/articles/news-journalrecord-11jan99.htm>.

103. DOYLE, *supra* note 102.

104. Gift policies for state legislators range from zero tolerance, to bright lines, to disclosure, to restrictions only on gifts intended to influence. See generally Ginger Sampson & Peggy Kerns, *Eye on Ethics: Briefing Papers on the Important Ethics Issues: Gift Restriction Laws for Legislators*, NAT'L CONFERENCE OF STATE LEGISLATURES, June/July 2002, available at <http://www.ncsl.org/programs/ethics/legisbrief-gifts.htm>.

conferences with significant industry presence, particularly with financial support from parties of interest, always calls for both knowledge of rules and sensibility.<sup>105</sup> Where regulators go, industry follows. Excessive, distant, and international travel, no matter how noble the purpose, may dismay local constituents. Extravagance is at odds with the spirit of public service and the more lavish or exotic the event or destination, the greater will be the boondoggle perception. Seclusion is also not conducive to inclusion. Conference and event organizers should respect ethical boundaries and the obligations of open government, be sensitive about appearances, and be aware of the burdens of participation. Governments ideally will support travel by public officials for government business. A surely unintended consequence of fiscal constraints and spending restrictions is the inclination of some officials to seek travel sponsorship or stipends that may invite conflict.

Employment issues raise both policy concerns and practical dilemmas. In many jurisdictions, employment rules are designed to slow the “revolving door” through which regulators leave to work for parties with direct or indirect interests in regulation. The passage leads frequently to regulated companies, but may traverse briefly through the hallways of legal offices, consulting agencies, or trade associations. Employees of regulated companies may also be restricted from employment by the regulatory agency or may be required to recuse themselves from participating in related cases.<sup>106</sup> The law firms of attorneys appointed to the commissions may need to temporarily suspend their regulatory practice. Following their service, a “stay-out” or “cooling-off” period (typically one year) usually restricts commissioners and in some cases professional staff from working for companies or their counsels.<sup>107</sup> Invoking the theory of capture, at serious issue is whether employment prospects in the private or public sectors influence the behavior of regulators while on the bench.<sup>108</sup> Especially egregious, of course, is the direct offer of employment to a sitting commissioner by any party that has an implicit or explicit expectation of favorable regulatory treatment.

Employment presents a distinct dilemma because the potential for conflicts of interest increases with policy specialization and narrowing paths for career advancement. Regulators may gain valuable expertise that correlates with select employment opportunities and earning potential, and transferability to other endeavors is limited. Some may be able to return to a former profession, but many former regulators maintain a visible presence in the regulatory policy community. Short tenures and high turnover rates place many younger

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105. In a vivid example of the politics of perception, a letter from Ralph Nader to the Inspector General of the Federal Communications Commission implored him to investigate industry sponsored travel he characterized as “junkets,” “fraternizing,” “institutional payola,” and “opportunities for ex parte violations that would curl your hair.” Letter from Ralph Nader to H. Walker Feaster III, Inspector General, Fed. Communications Comm’n (May 29, 2003) available at <http://www.nader.org/index.php?archives/74-Ralph-Nader-Letter-to-FCC-Inspector-General-H.-Walker-Feaster-III.htm>.

106. Former company employees might be perceived as “infiltrators,” but possessing relevant expertise and experience they are probably as likely to be well-informed and effective regulators.

107. See, e.g., COMMON CAUSE FLORIDA, A STATE AGENCY IN NEED OF REFORM: FLORIDA’S PUBLIC SERVICE COMMISSION, <http://www.consumerfederationse.com/cfsereport2.pdf> (last visited Sept. 12, 2008).

108. Of course, the prospect of re-election or reappointment might also influence behavior.

regulators back on the job market; some are enticed to leave public service before completing their terms for more lucrative private-sector positions. Recruiting only persons approaching retirement would curtail employment-seeking behavior, but it would also shrink and skew the pool of eligible candidates. Occupation and compensation are matters of personal economic freedom. Nonetheless, all regulators must accept the terms of their appointments, including exit conditions, and plan accordingly for an ethical transition that thwarts the temptation to negotiate employment while still in an authoritative position.

#### *D. Personal Responsibility*

Laws, rules, and consequences are clearly necessary but not sufficient to ensure ethical behavior. Pursuant to Illinois law:

Each commissioner and each person appointed to office by the Commission shall before entering upon the duties of his office take and subscribe the constitutional oath of office. Before entering upon the duties of his office each commissioner shall give bond, with security to be approved by the Governor, in the sum of \$20,000, conditioned for the faithful performance of his duty as such commissioner.<sup>109</sup>

No code of conduct, or mechanism of accountability, can substitute for true dedication to public service coupled with an inherent sense of personal responsibility for ethical behavior.<sup>110</sup> Simply put, “[t]he prospects for ethical government are greatest when there are selfless public officials.”<sup>111</sup> Attending to one’s own behavior is a form of personal self-regulation. The pensive recognize that choices about individual conduct have consequences not confined to the individual. Although incompetence does not constitute impropriety, understanding the rules is a measure of professional proficiency and ignorance is a form of negligence. The excuses for transgression are few, if any. Personal responsibility means not delegating accountability or depending on others, particularly those having other interests or ulterior motives, to define the boundaries of acceptable behavior or check one’s own conduct. Personal responsibility means seeking out qualified advice, namely designated ethics officers, but never laying blame for missteps on legal, financial, or other advisors. Personal responsibility means avoiding precarious situations, exercising sound judgment, and erring always on the side of caution.

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109. Public Utilities Act, 220 ILL. COMP. STAT. 5/2-102 (2001).

110. Enron’s sixty-four-page *Code of Ethics*, dated July 2000, is prefaced by a message from Chairman Kenneth Lay,

As officers and employees . . . we are responsible for conducting the business affairs of the companies in accordance with all applicable laws and in a moral and honest manner . . . . We want to be proud of Enron and to know that it enjoys a reputation for fairness and honesty and that it is respected . . . . Enron’s reputation finally depends on its people, on you and me.

CODE OF ETHICS, ENRON CORP., (July 2000), available at <http://www.thesmokinggun.com/graphics/packageart/enron/enron.pdf>. On the last point few would find disagreement with Mr. Lay.

111. H. George Frederickson, *Ethics and the New Managerialism*, 4 PUB. ADMIN. & MGMT: AN INTERACTIVE J. 299, 302 (1999).

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Ethical challenges are inherent, inevitable, and unavoidable. With a working moral compass, the line separating right and wrong should be plainly obvious and require little contemplation. The rules may encumber individuals, but their purpose is to preserve the integrity of the institution. Behavior should not be driven by the fear of discovery, incrimination, or punishment, but by the commitment to public service. The prudent regulator assimilates the solemn pledge to their office, regards the codified rules of conduct as perfunctory, and aspires to a higher threshold of trust and accountability.

*E. Consequences of Unethical Behavior*

The consequences of ethical breaches are individual, organizational, and institutional. For individuals, the penalties may be more or less certain, swift, and severe, depending in part on how offenses are committed, discovered, and managed. Humans make mistakes, and honest ones often can be remedied, and even pardoned, if the contrite accept responsibility without hesitation. In American political culture, it often is not the original infraction that takes down the mighty, but the hubris and hypocrisy, the denial and deception, and the obfuscation and obstruction of justice or “cover up.”

A thought experiment to “scare straight” the wandering conscience is to consider the worst that can happen. The fall from grace hits hard and poor choices are truly self-destructive. Public officials who violate the rules of ethics may pay a high personal price, including the loss of position by removal for cause, and even the loss of personal freedom. The accused incur legal expenses; the guilty may pay fines, serve jail time, and acquire a criminal record.<sup>112</sup> Just the allegation of unethical behavior can have lasting effects on personal and professional reputations and relationships; the associated humiliation and embarrassment is shared by family, friends, and colleagues and always made worse by sordid or lurid details. News, gossip, and innuendos spread rapidly in the regulatory subculture, but are not confined to it. The media’s glare can be unrelenting, unforgiving, and indiscriminate. The rumored peccadillo may appear in large print as a “possible violation of the ethics rules” and circumstantial evidence may be sufficient for conviction in the court of public opinion. Misconduct has repercussions for political parties and administrations, and the sacrifice of political career is more common than not. Exoneration is elusive, recovery is improbable, and legacies are tarnished indelibly.<sup>113</sup> It is not unusual for the obituaries of disgraced public officials to revisit an ethics charge.

Organizations share scandals with the offenders within; they may also share liability. In the aftermath of an ethical storm, the normal processes and proceedings of government are disturbed for all participants. The resulting uncertainty reflects poorly on regulation and affects perceptions about regulatory climate, which can be costly. Scandals distract, detract, and redirect attention away from issues of substance and importance. Small breaches may trigger expansive and potentially disruptive investigations. The result may be the loss of administrative discretion, including the imposition of well-intended but possibly cumbersome rules or added controls on the deployment of agency

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112. Detroit Mayor Kwame Kilpatrick provides a case in point.

113. New York Governor Elliot Spitzer provides a case in point.

resources. Companies embroiled in controversy fare no better, and deeper pockets pay steeper fines in ethics prosecutions. Boards may find themselves engaged in firings, resignations, and damage control. Brands devalue, corporate images suffer, and investors applying social responsibility screens may balk. Calls to strengthen corporate governance and accountability may come from shareholders, auditors, and rating agencies, as well as the public sector.<sup>114</sup>

Ethical negligence breaks the covenant of independent regulation, including the promise of justice under the social compact. The institutional integrity of regulation, in other words, rests squarely on the shoulders of ethical regulators. Corruption of people leads to corruption of process, output, and outcome. As regulators lose credibility, parties to the process lose faith and confidence and a wary public grows disenchanted and disaffected. Betrayals of trust erode regulation's authority and legitimacy, giving rise to institutional contestability and posing a threat to institutional sustainability. The efficacy and social value of regulation eventually are weighed against the alternatives, which include its potential demise as a policy instrument. To deregulate for reasons of perceived regulatory failure, rather than proven market success, would be manifestly *imprudent*.<sup>115</sup> The prudent regulator accepts accountability for individual choices that have profound institutional implications, and is thus deserving of the public trust. For regulation in the public interest, there may be no greater imperative.

#### V. EPILOGUE: PRACTICAL ETHICS FOR THE PRUDENT REGULATOR

At the risk of omission and saying what should go without saying, a sample of practical suggestions can be commended.<sup>116</sup> The prudent regulator:

1. Thinks and talks about ethics, and attends ethics training, before problems or controversies arise.
2. Fosters an ethical organizational culture and environment.
3. Leads by example and commands respect by maintaining appropriate boundaries and demeanor.
4. Completes ethics and accountability statements, and fully discloses financial and other interests and activities.
5. Avoids conflicts of interest by limiting extra-commission activities and reports conflicts as required.
6. Adheres to campaign finance rules as applicable.
7. Does not compromise personal ethical values or become complacent about ethics over time.
8. Respects the ethical choices of colleagues and staff members.
9. Is familiar with professional standards and canons (*e.g.*, the Bar, NARUC).

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114. Shareholder accountability can promote corporate managerial ethics. The Sarbanes-Oxley Act also brought much attention to corporate governance. Not surprisingly, many corporations today require ethics training.

115. Any withdrawal of regulatory safeguards must be informed by rigorous analysis and is untenable in the context of persistent and deleterious market failure (*e.g.*, monopoly and other intolerable imperfections).

116. To paraphrase lectures by former Ohio Commissioner Craig Glazer on the subject, "Remember the little stuff – that's how they get you." When it comes to ethics, of course, no "stuff" is little after all.

10. Understands and follows the rules and procedures of their jurisdiction.
11. Recognizes that responsibility for compliance is theirs alone, and never relies on others to define acceptable behavior.
12. Knows how rules vary for different roles, venues, and proceedings.
13. Regards the written rules as minimal requirements and always errs on the cautious side.
14. Sharpens and trusts their instincts about conflicts of interest and situations requiring ethical judgment.
15. Recognizes the biases and interests of themselves and others.
16. Does not prejudge issues that may come before them, or make prejudicial statements or endorsements.
17. Does not act in an advisory capacity to regulated interests or other stakeholders.
18. Is cautious about telegraphing policy preferences or decision intentions.
19. Participates in open, inclusive, and balanced professional and educational forums.
20. Is discerning about information, and its origins and intentions, and gives notice of pertinent extra-record information.
21. Recognizes when they are being lobbied, pressured, flattered, or bamboozled.
22. Is cognizant of the interests of third parties and agents (*e.g.*, attorneys, analysts, and consultants).
23. Keeps in mind that the *quid pro quo* may not be entirely obvious.
24. Learns when and how to say “no” to inappropriate overtures.
25. Is accessible to all constituencies in accordance with applicable rules.
26. Is fair and open-minded, and welcomes diverse perspectives.
27. Writes emails as if they are public, publishable, discoverable, and unprotected by attorney-client privilege.
28. Is aware of appointment and phone records of all types.
29. Invites a witness to be present at meetings and keeps copious notes.
30. Is cautious about industry friendships and favors.
31. Travels judiciously and responsibly, and complies with travel policies.
32. Is knowledgeable about rules related to conference and event sponsorship and participation.
33. Knows who is picking up the tab and pays their own way whenever necessary.
34. Rejects and returns gifts and gratuities and keeps records of doing so.
35. Establishes trust with oversight bodies (*e.g.*, legislative committees).
36. Plans and prepares for a career path that minimizes conflict.
37. Is cautious, but open and responsive when interacting with the media, and consults with agency media experts.
38. Knows that news, gossip, and innuendos tend to spread quickly in the regulatory subculture and are not confined to it.
39. Does not rationalize borderline behaviors, even if occasional or seemingly minor.
40. Does not practice denial, defensiveness, or indignation.

41. Seeks advice from the ethics officer, and does not self-advise, interpret, or guess about the rules of conduct.
42. Comes clean quickly and completely about accidental breaches, and does not obfuscate or attempt to spin.
43. Learns from their mistakes and those of others.
44. Is acutely aware that in public life perceptions and appearances matter as much as technical violations.
45. Knows that news and gossip tend to spread in the relatively confined subculture of regulation.
46. Considers the prospect of a sensational newspaper headline and whether they can live with it.
47. Looks in the mirror and strives to make their [parents, spouse, and/or children] proud.
48. Takes a long-term view, because memories of scandal are long and personal and professional stakes are high.
49. Appreciates how ethics relate to institutional integrity and sustainability.
50. Keeps sight of their obligations to the public and the public interest at all times.