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

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Synopsis: The concept of *prudence* is 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 as well be applied to the institution of regulation itself and those responsible for its endurance. Regulation is, by nature and necessity 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 standards of conduct, but in broader terms of institutional sustainability. The price of imprudence is paid not only by those whose impropriety violates the public's trust, but by the very institutions they serve. Adopting an institutional perspective, this review advances the concept of the prudent regulator by examining the intricately related and largely inseparable concepts of politics, independence, ethics, and the enduring imperative of regulation in the public interest.

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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, intellectual, 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 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 the number of resume lines.

Nonetheless, humble observation over many years and many regulators is suggestive of some broad and mostly indubitable generalizations. The good regulator is, above all else, *dedicated to public service.* The job pays relatively well along government scale, but typically less than the private sector, and primarily attracts those oriented to public service; for some, it is a virtual calling. The job is probably not well suited to those whose dogma disfavors governance and the legitimate role of the state. The job is "not just a job" but a frame of mind and a pledge. The good regulator thus *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 pursuit of a larger common good. The calculus of the public interest, is in many respects, a process of elimination[1] informed by politics, but guided by established principles, educated instincts, and the artful blending of science and conscience.

Given the substantive demands of that process, the good regulator demonstrates *intellectual curiosity* in general and a genuine interest in the subject mat-

1. Regulatory law seems to give less 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)).

ter 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, and welcome rigorous empirical analysis and constructive debate. Regulators are more than likely to find themselves outside of their intellectual comfort zone. The public-interest mandate in combination with the intellectual rigor of the work also argues for bringing a healthy dose of *personal humility* to the job of regulator, which at times may seem antithetical to the political immodesty required of those who seek high office.

Independence from various political interests, even to those to which they feel beholden, is another essential characteristic that is also reinforced procedurally. Good regulators are generally non-ideological, non-dogmatic, and without agenda or political motive. Given the political context and import of their job, 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. Predisposition, obstinacy, and stridency also contradict the cause. Commissioners dispense a specialized form of justice and are well served by adopting a *judicial demeanor,* temperament, and disposition. The commissioner-judge is circumspect but decisive and incapricious in the discharge of their duties. Also working to their advantage in the complex commission cultural model are maturity, sensibility, patience, and collegiality. Last and certainly not least, good regulators also demonstrate a conscientious and uncompromising *commitment to ethics.* They operate at all times with the knowledge that perceptions 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 attached to their office and mission.

As will be explored here, the *prudent* regulator demonstrates all of these values – 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 effective in achieving its vital purpose.

II. REGULATORY POLITICS

Regulatory ethics are related intrinsically to regulatory politics. While "legal," "social," "economic," or "technical" are regarded as positive, being "political" is almost always viewed pejoratively. Politics, the art of diplomacy, the act of governing, and the determination of "[w]ho [g]ets [w]hat, [w]hen, [and] [h]ow,"[2] is essential to civil society, democracy, and the translation of values into public policy.[3] The American culture is infused with politics and behaving politically is normal, not exceptional. Democratic politics are necessary and bet-

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

3. *Id.*

ter than the alternatives,[4] but imperfect and vulnerable. Politics are often interest driven and the results of political processes may not align 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.[5] More importantly, ethical breaches can exact a penultimate political price because they undermine the public's very trust in governance and the institutions on which it relies.

Opinion polls consistently reveal the tenuous trust of government[6] and the public's wariness about the state of moral values, the allegations of misconduct on the part of politicians, and the ability of the parties to "deal with" problems of ethics.[7] Among the professions, members of Congress (along with journalists and lawyers) are not regarded as particularly "trustworthy" (scientists, professors, and judges fare much better).[8] The public is particularly disapproving "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 arduous.

Given both high stakes and far-reaching consequences, it comes as no real surprise that regulation is political *and always has been.* Regulation as an institution was born of political compromise.[9] 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,[10] utility regu-

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4. 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).

5. 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).

6. 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.

7. 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).

8. 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).

9. Early reformers found that "public utilities studied 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." CHARLES A. BEARD, PH.D., READINGS IN AMERICAN GOVERNMENT AND POLITICS 548 (Macmillan Co. 1910) (1909).

10. 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 (Louisianna), Senator Paula Hawkins (Florida), and Representative J.C. Watts (Oklahoma). Many federal commissioners have been promoted from the state commissions. THE WHITE HOUSE, ENVIRONMENTAL PROTECTION AGENCY, ADMINISTRATOR CHRISTIE TODD

lation infrequently provides a path to higher political office, perhaps partly because regulatory decisions must seek balance and justice above political expediency, popularity, or ambition. In fact, the job of regulator, when done well, can be distinctly uncomfortable and *unpopular* because typically no constituency is completely satisfied. Regulation is governing and governing is political. Regulatory politics are a microcosm of politics in general, where a wide range of interests compete for "[w]ho [g]ets [w]hat"[11] in a measured manner meant to reveal the public interest.

A. Politics of Partisanship

The partisanship and ideology that may be key to electoral success, or lawmaking 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 the minority. Requirements for party diversity, staggered terms, and the more limited use of selection criteria, are meant to mitigate partisan influence and policy swings that can create potentially costly instability, inconsistency, and uncertainty. When administrations change amid heightened politics, 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 supported by an evidentiary record. Nonetheless, partisan politics can be manifested in the partisan composition of commissions, changing with administrations over time, and also in executive and legislative policy 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.[12] Although evidence to the contrary may be seen in politically charged environments, both the theory of independent regulation and its quasi-judicial mode suggest that the effect of party should be negligible.

Elected, appointed, re-elected, or reappointed regulators campaign for the job and seek political support and approval. Favoritism and cronyism sometimes trump credentials. Partisan and special interests weigh in on the selection process publicly, and behind the scenes. The concern is not *input* but influence that

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WHITMAN (2001), http://www.whitehouse.gov/government/whitman-bio.html; UNITED STATES INTERNATIONAL TRADE COMMISSION, COMMISSIONER CHARLOTTE R. LANE (2004), http://www.usitc.gov/ext_relations/about_itc/lane.htm; LOUISIANA SECRETARY OF STATE, KATHLEEN BABINEAUX BLANCO (2004), http://www.sos.louisiana.gov/tabid/411/Default.aspx; UNITED STATES CONGRESS, BIOGRAPHICAL HISTORY OF PAULA HAWKINS (1987), http://bioguide.congress.gov/scripts/biodisplay.pl?index=h000374; UNITED STATES CONGRESS, BIOGRAPHICAL HISTORY OF JULIUS CAESAR WATTS, JR., http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000210.

11. LASSWELL, *supra* note 2.

12. For an empirical assessment of commission behavior, *see generally* 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 (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).

has the potential to distort and disenfranchise, with implications 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 conception of their duties wholly at variance with the original object for which they were created.[13]

Decades later, political 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."[14] This rendition of the revolving-door hypothesis rests on speculation as to whether the *past* employment of regulators is material and begs the question of whether it is as material as the prospect of *future* employment.

B. Contemporary Regulatory Politics

Politics are ubiquitous in each major period in regulatory history, from origins that coupled progressive reform and industry protectionism; to the New Deal and expansion of the federal role; to the nascent energy crisis and the Bell divestiture; to restructuring and now "regulatory rethink" and possibly 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 issues bring attention to regulatory roles, but also obligations that may in turn be examined in political, social, and even moral terms.[15] Resource choices in the context of global climate change provide a vivid illustration.

Regulation in the new millennium is probably no more political, but certainly no less. Contemporary regulatory politics are 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 find that regulation presents a career path following a term limited

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13. 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.

14. 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.pubicintegrity.org/telecom/report.aspx?ais=762.

15. The worthy issue of regulatory "morality" is beyond the scope of this discussion.

legislative post.[16] As in the past, partisanship, ideology, and personal agendas can be apparent. Appointing executives may expect and appointed commissioners may want to deliver particular policies. Although it seems to belie the theory that regulators are driven by self-preservation, a distinctly modern development is the concerted proclivity of some federal and state regulators toward *deregulation.*[17] The particularly heated 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.[18]

The 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. The Governor of Illinois publicly reminded his appointees,

> It is your job to ensure that rates remain just and reasonable . . . 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 . . . [and] to declare that competition does not exist in the residential market.[19]

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."[20] Members of Congress openly implored the Federal Energy Regulatory Commission (FERC) to "provide prompt relief for consumers . . . harmed by [their] region's dysfunctional energy markets and the associated unjust and unreasonable wholesale electric prices."[21] Former FERC regulators expressed their "support for continuing federal policies to promote open and competitive markets for electric power."[22] Former state regulators who were "there to witness that the 'good old days' of electricity regulation

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16. 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 [hereinafter *Demographics*].

17. 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.

18. 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).

19. Letter from Illinois Governor Rod R. Blagojevich to the Illinois Commerce Commission (Aug. 31, 2005) (http://www.secinfo.com/duJch.z7n.d.htm).

20. 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.

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

22. 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), *availible at* http://www.allianceforretailchoice.com/formeropenletter.pdf .

were actually not that good,"[23] declared that "[i]f given a chance, consumers will tell the market what they want and the market will respond."[24] Some "notable economists" urged policymakers to "stay the course and continue to support restructuring and the evolution of competitive wholesale and retail markets for power."[25]

The postal delivery of facts, opinions, or expertise exempts them from examination and rebuttal under the light of the evidentiary process. Any assignment of weight to their merits can be very arbitrary. Though not necessarily untoward, open letters also speak to the somewhat peculiar manifestations of modern regulation and are simultaneously suggestive of participatory democracy and pressure politics. Indeed, these campaigns illustrate well 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 agencies is abolishment by reorganization. The governor of Tennessee replaced the state's elected body with an appointed commission in 1996.[26] The Alaskan legislature reorganized the state's commission in 2000 and included a three-year sunset provision.[27] 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 commissioners, and altered their appointments from statutory to "serving at the pleasure."[28] 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 make regulators more independent, politically motivated change often makes them less so.

Electricity restructuring opened ideological and policy divides across and within states. High political drama ensued in the wake of public controversy over escalating rates, set in motion by states' own restructuring legislation. Both Maryland and Illinois saw failed attempts to remove commissioners from office by the legislature in the former case and by the governor in the latter.[29] Partisan

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

24. *Id.*

25. 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.

26. THE TENNESSEE ENCYCLOPEDIA OF HISTORY AND CULTURE, TENNESSEE PUBLIC SERVICE COMMISSION, http://tennesseeencyclopedia.net/imagegallery.php?EntryID=T054.

27. Regulatory Commission of Alaska, ALASKA STAT. § 42.04.01 (2008); Expiration of state boards and commissions, ALASKA STAT. § 44.66.010 (2008).

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

29. In 2007, commissioner resignations were requested by the Ohio Attorney General because their nomination allegedly violated the state's Sunshine Law, but the moment was seized for political purposes by commission critics. Alan Johnson, *3 PUCO officials asked to resign*, THE COLUMBUS DISPATCH, Apr. 4, 2007,

allegiance, or lack thereof, was at issue in both cases, raising the specter and spectacle of political intrusion. Allegations of political motives in the dismissal of senior staff members, as well as impropriety, complicate the Maryland case considerably.[30] The court eventually ruled the attempted legislative "firing" of executive officials unconstitutional.[31] Ethical breaches, unlike political disagreement or policy dissatisfaction, suggest the possibility of legitimate removal *for cause* in accordance with due process, rights to a public hearing, and on the basis of specified criteria (such as malfeasance, misconduct, immorality, or criminality).[32] Some of the legitimate 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.[33] Disagreement over policy or its impacts, no matter how intense, is insufficient.[34] As put by one expert on judicial conduct, "[i]t's one thing to be wrong. It's another thing to be unethical."[35] Independence must be preserved and defended, in other words, not just when decisions are agreeable. The protection of commissioners from reactionary politics is protective of the commission itself and removal without just cause is more injurious to the institution than to the individual.

Policy ends cannot justify political means that undermine independence. On matters of policy, executives and lawmakers must find constructive methods of authoritative intervention 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 statutory policy that was ill-conceived in the first place and confines regulatory discretion to unreasonable and unacceptable options, although they are obliged to voice their concerns. Commissioners that use loopholes to skirt legislative intent, ignore the general will, or abuse the public trust clearly do so at their peril. Commissioners should also be held accountable for processes, policies, and outcomes of their own doing, but by established judicial, legislative, and political means, respectively (*e.g.*, appeals, laws, 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

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availible at http://www.dispatch.com/live/content/local_news/stories/2007/04/04/PUCOAPPT.ART_ART_04-04-07_A1_S869H58.html; Alan Johnson, *Critics want new members at PUCO*, THE COLUMBUS DISPATCH, Apr. 5, 2007, *available at* http://www.dispatch.com/live/content/local_news/stories/2007/04/05/NEWPUCO.ART_ART_04-05-07_E1_AV69U51.html.

30. David Nitkin & Kelly Brewington, *PSC head, lobbyist shared strategy – Schisler, industry advocate exchanged e-mails last year*, BALTIMORE SUN, Mar. 18, 2006 (critics and the press referred to the removal of the Maryland staff as the commission's "lobotomy").

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

32. In Michigan, a commissioner "may be removed by the governor for misfeasance, malfeasance or nonfeasance in office." MICH. COMP. LAWS § 460.2 (1951).

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

34. CAL. CONST. art. XII, § 1 (2008); ALASKA STAT. § 42.04.020 (2008).

35. 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.

meddling and its chilling effects, and free to contradict the preferences of those in power.

Like all politics, regulatory politics become deleterious 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. Regulation that is "too weak," when regulation is justified and necessary, is as bad or worse for business as regulation that is "too strong" because weakness leads to public outcry, 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 rise above the political fray and 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),[36] from political parties, from 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 counsel, consultants, and associations).[37] The Rawlsian conception of justice might have commissioners wear a "veil of ignorance"[38] to filter bias from both rulemaking and ruling.[39] 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 but they are not extensions of those offices serving at their pleasure. Commission structures and processes reinforce their institutional autonomy.[40] Regulato-

36. In economic regulators, "legislative ratemaking" played a role in the creation of independent commissions in the first place.

37. 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 vulnerable 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).

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

39. *Id.*

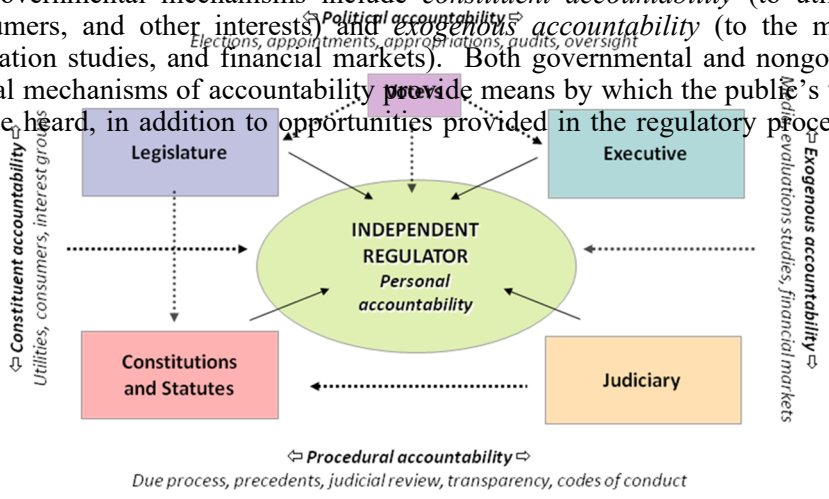
40. "The Commission is deliberately structured to have a significant degree of independent decision-making autonomy." MINNESOTA PUBLIC UTILITIES COMMISSION, ABOUT US, http://www.puc.state.mn.us /about/index.htm (last visited Sept. 8, 2008).

ry discretion within a "zone of reasonableness"[41] also is considerable by design and for good reason; that is, to provide a superior means of policymaking relative to administrative, legislative, or judicial alternatives.

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). The 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 include *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.[42] *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. Both legislative response and judicial review provide essential checks and balances on behalf of the public that might either validate or void commission policy. Testing the boundaries of independence is core to the rich history of constitutional case law that has guided regulators for more than a century. The procedures of administrative law provide for fairness, as well as accountability. Nongovernmental mechanisms include *constituent accountability* (to utilities, consumers, and other interests) and *exogenous accountability* (to the media, evaluation studies, and financial markets). Both governmental and nongovernmental mechanisms of accountability provide means by which the public's voice can be heard, in addition to opportunities provided in the regulatory process itself.



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

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

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 to regulation as an institution. 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 to regulation's authority and legitimacy, as well as provide for accountability.

B. Interests and Influence

In a pluralistic society, special interests compete for policy attention.[43] Special or vested interests are *legitimate* interests that are defined considerably more narrowly than *the public interest,* which indeed should be the sole special interest of the independent regulator and never betrayed for personal advantage.[44] 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. 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 vendors) are omnipresent in modern regulation because they share a stake in its outcomes.

Influence may be targeted strategically to the particulars of legislation, rules, orders, and policy resolutions, as well as to more general image-building for themselves and their 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, particularly long-standing incumbents, also have advantages. It is not unusual for industry lobbyists to supply draft policy language during the formulation stage of the 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 rate-

43. On the deleterious 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).

44. *Id.*

payers supply all of the public utility's revenues, lobbying expenses normally are borne by shareholders because shareholder interests are at issue.[45]

Information is rarely neutral; that which is has special 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 seek to advance agendas. 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.[46] Effective informal and formal intervention on behalf of smaller consumers or other interests can be costly and cumbersome.[47] The prudent regulator is discerning and cognizant of the potential for the lopsided quantity and quality of information to tip the scales of justice.

Differential access, a function of resources and also of rules, can also be distorting. Access is advantage in placing issues on the policy agenda and advancing positions, and exclusion matters. 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, and otherwise disadvantaged interests, 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, open, and inclusive, and 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. The notices of ex parte communications are hardly informative to the smaller user.[48]

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 interest, but the methods by which it is advanced.

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45. That is, actual shareholder returns are net of lobbying and other expenses allocated "below-the-line."

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

47. 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).

48. 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* FEDERAL COMMUNICATIONS COMMISSION, FACT SHEET (2001), http://www.fcc.gov/ogc/admain/ex_parte_factsheet.html.

Modes of unscrupulous influence can be blatant and explicit (*e.g.*, bribery and offers of future employment), but can be much more subtle (*e.g.*, small favors, suasion, and sycophantism). Regrettably, some public officials invite influence by expecting or even soliciting material and other favors, small and large.

Perceptions of undue and unfair influence feed the cynical "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.[49] Capture can be manifested in the "iron triangles" that form among agencies, legislators, and regulated industries.[50] Imbalanced socialization and coziness may accelerate the process. Bias that creeps in with no other impropriety is bias nonetheless. Socially responsible participants in regulation across the board, public and private, 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.[51]

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 excessive influence from society's foreclosed, alienated, and disenfranchised. The considerable leverage of the few flouts the rights of many at society's expense. The insidious consequence of distorting influence is that it undermines and jeopardizes the very institutions created by social compact to serve the interests of the influencers. 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 mitigating deleterious social and institutional effects.

C. The Independent Commission

Paralleling the debate about "judicial activism," ongoing debate swirls 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?[52] 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. In their *quasi-administrative* capacity, regulators interpret policy and apply technical expertise to the routines of rulemaking, implementation, and enforcement.[53] In their *quasi-legislative* capacity, regulators are en-

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49. BERNSTEIN, *supra* note 37; Stigler, *supra* note 17. 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.

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

51. *Id.*

52. For a finding that commissions are narrowly creatures of the legislature and bound by statutory law, *see generally* Union Carbide Corp. v. Pub. Serv. Comm'n, 428 N.W.2d 322 (Mich. 1988).

53. Denise Parrish, Presentation: Rate Base, Rate-Of-Return, Regulation Overview at Banjul, Gambia (July 19-23, 2004), *available at* (http://www.itu.int/ITU-D/finance/work-cost-tariffs/events/tariff-seminars/banjul-04/gambia-5.pdf.

trusted to make policy and to inform and support policymaking by other bodies.[54] In their *quasi-judicial* capacity, regulators make decisions in the context of particular cases and in accordance with established law and legal procedures.[55]

Role	Governance model	Role mode	Function	Procedural emphasis	Orientation	Decision mode	Product
Quasi-administrative	Bureaucratic	Expert	Implementation	Reactive	Outputs	Managerial	Rules
Quasi-legislative	Democratic	Trustee	Formulation	Proactive	Outcomes	Political	Policies
Quasi-Judicial	Jurocratic	Judge	Adjudication	Protective	Process	Deliberative	Orders

Exhibit 2. Institutional complexity of independent regulatory commissions.

Invariably, policy "happens" in each of the conjoined arenas and is articulated 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 challenges. The complex coexistence and intersection of institutional roles under one roof is inherently messy and cannot be tidied without losing more than would be gained. Politics and controversy can attach to any of the roles and to the conflicts that arise among them. The bureaucratic role invites consideration of agency effectiveness and efficiency, the legislative role of institutional autonomy and authority, and the judicial role of the boundaries of activism and potential conflicts with 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 a finder of fact, a crafter of policy, and an interpreter of law, enduring a sanctioned condition of multiple personality where politicians must think like judges, judges must think like experts, experts must think like politicians, and so on. Shaping policy in a particular direction cannot be perceived as prejudging a contested case, just as a ruling in a particular case 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 ori-

54. *Id.*
55. *Id.*

ented may be perplexed by the demands of legal procedure. The politically oriented may need to limit modes of interaction and forego the inclination to broker solutions. The legally oriented may need to appreciate the intricate subtleties of politics and policymaking in contrast to the absolutes of traditional litigation. The prudent regulator finds ways to fulfill all three roles with agility and reconcile 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, or 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"[56] and echoes the judicial creed that commissioners should be "unswayed by partisan interests, public clamor, or fear of criticism." [57]

At its core, regulation by independent commissions is distinctly and undeniably judicial in form and character. 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 the ultimate arbiter. The statutory basis for regulation is replete with judicial references with regard to 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 embody 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. The regulatory process, like the judicial, requires findings of fact and law in the tenacious pursuit of not simply compromise but *truth.* Administrative law judges or hearing officers assist the effort. Although the literal designation of commissioners as judges is rare,[58] judicial demeanor is a worthy aspiration for all those in the service of regulation. Statutes and codes of conduct frequently include requirements designed to "preserve the quasi-judicial function of the commission."[59]

Independent regulation in its quasi-judicial form is admittedly institutionally conservative, but remains essential to promote the public interest in the context of persistent market failure.[60] 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 provide a context for equal

56. 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.

57. *Id.*

58. Judges at the Virginia Corporation Commission are a prominent example.

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

60. Market failures or imperfections include but are not limited to monopoly, market power, externalities, failure to protect the commons, and undesirable social or distributional outcomes.

protection. Adjudication and appeals clarify substantive policies and establish the legal precedents so central to and revered in the practice of regulation. Not all matters of contemporary regulatory policy lend themselves well to the traditional judicial model and the rules of contested proceedings.[61] 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 formulation.[62] 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 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 the job of 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 particular academic disciplines. Some might like the idea on its face, particularly 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, make compromises, and muddle through no longer pertain. What might be gained in technical expertise would be more than offset by the sacrifice of democratic principles and the system of justice that sees to their perpetuation.

Concerns about policy outcomes suggest a role model that is more politically oriented to ensure that regulators are responsive and accountable to the constituencies they serve. Both elected and appointed commissioners might be characterized as *trustees* in accordance with the theory of representative democracy, which calls for public officials to apply principled judgment in policymaking.[63] Commissions are organized as panels, not single administrators, for collective deliberation but also to mitigate bias and provide for representation and perspective across geopolitical, demographic, and other criteria. Like technocracy, a more political orientation presents 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 may be eluded if met with political resistance or possible retribution from the public at large, public officials, or powerful special interests. The inequality

61. Facility siting and resource policies provide good examples.

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

63. The delegate form of representative democracy is reminiscent of legislative ratemaking and political trappings that independent regulation was meant to replace. The selection process for regulators does not necessarily foretell the democratic theory to which they subscribe.

of representation and influence 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 like a less politically demanding form of policymaking than legislating, depending on the scope and controversy of the issues. Litigating is narrow and positional; legislating is broader and pluralistic. Although case-specific decisions may be a less explicit form of policymaking, they are not necessarily less consequential or 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 that must be met to justify judicial activism.[64] All forms of activism invite politicization. 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 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 the roles are mutually enhancing, their intellectual emphases are complimentary, and their mechanisms of accountability are reinforcing.

The prudent regulator takes "a principled approach to regulation, an empirical approach to regulatory analysis, and a reasoned approach to structural and regulatory change."[65] The prudent regulator is an expert who examines evidence and applies technical insight to policy choices. The prudent regulator practices a specialized jurisprudence and enjoys a degree of deference from other policymakers, including the judiciary proper. The prudent regulator dispenses a justice both enlightened by knowledge and respectful 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 public they serve. The prudent regula-

64. *Democracy and the Court* (Aspen Institute broadcast July 7, 2007) (http://fora.tv/2007/07/07/Justice_Stephen_Breyer_Democracy_and_the_Court) (Justice Breyer maintains that the Court must take action, on constitutional grounds, when other institutions fail in their duties).

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

tor makes policy while being circumspect about regulatory activism and taking measure of their place within the intricate balance of political power and its essential system of 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.[66] A modern paradox found in the increased reliance on markets, including forms 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." They can also 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 essential in 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 contested case), and over time (that is, staff that serve 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 experts. Staff advocacy usually requires temporary or permanent organizational separation and 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 coerced or intimidated as any other expert in any other 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 intermediary, may jeopardize staff independence and invite internal politicization. Control of staff or other agency resources by an outside agency can invite external politicization. A few states have opted to strictly bifurcate the staff according to its advocacy and other roles, in some cases locating advocates in another agency altogether.[67] The result is to enhance the autonomy of the staff advocates, but a nontrivial cost is the loss of in-house technical expertise available to the commissioners. Separation may also leave a vacuum in

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

67. Indiana, Minnesota, South Carolina, and Vermont provide examples.

the "middle" of the decision record if no one is left to advocate for the public interest.

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).[68] Ideally, both will want a thoughtful counterpart in the pursuit and not simply a captive interest. Commissioners should expect more from staff than simply validation of autocratic decisions and staff should expect commissioners to come to their own conclusions deliberately and not just "rubber stamp" the recommendations made to them, including settlements negotiated with other parties. Commissioners should value and utilize the experience, expertise, and impartial analysis of the staff, and appreciate the sensitivities about decisions that run contrary to staff recommendations. Staff should respect the commission's authority and avoid entrenchment, recalcitrance, or the appearance of undermining.[69]

		Perspective	
		Commissioner	*Staff member*
Role	*Commissioner*	I. How commissioners view their own role	II. How staff members view the commissioner role
	Staff member	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 appropriately advocate a single recommendation, but alternatively might provide the commission with a range of defensible options. Most staff want to support the commission, but can 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 responsive by avoiding stridency from the bench, as well as by clarifying decisions, expectations,

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

69. 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.

and policy directions. A "post mortem" of major cases and decisions can also be revealing. Staff positions can be adapted and refined over time 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 mitigated by patient and skilled administration. Commissioners and staff are both well served by placing their trust in skilled executive managers, whose role is critical in overseeing the inner workings of the agency, allocating resources to functional roles, 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 at the pleasure"[70] of the commissioners. Still, managers can and do help commissioners and staff members understand their respective roles; encourage the staff to sharpen skills, strategies, and positions; provide opportunities for academic pursuits, professional development, mentorship, and socialization; solicit staff input on organizational concerns; and promote constructive conflict management and adaptation. Particularly astute managers imbue resiliency in the organizational culture and show the impassioned how to disagree and move on.

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 it serves. Regulators must be sensitive and responsive to their various constituents, perhaps particularly the ratepayer-voter. Evolving public values and preferences are expressed through political processes that must be factored into the calculus of the public interest. Regulatory policies that 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."[71]

Regulatory decisions are shaped by public opinion in a variety of ways. Opinions can be measured in votes and in the policies adopted by the public's duly elected representatives, which involve them in commission oversight and accountability. Parties represent voters in the political process and advocates represent various groups in the regulatory process. Open processes allow public observation and public hearings help ensure that the public's voice is heard and 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.

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

71. Roosevelt, *supra* note 13.

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.[72] If asked, the public invariably would prefer lower to higher rates but the regulator must ensure service provision by finding a rate that strikes the constitutional balance between ratepayers and shareholders. Public understanding and acceptance are balanced against other criteria, including revenue recovery, efficiency, and stability. That balance must also be found in the myriad of other policy choices that regulators are charged to make.

Regulators make policy in the din of clamor and criticism; politics turn up the volume. Few regulatory decrees appease all interests on all issues. Much of regulation is about choices, tradeoffs, and allocation, where strong opinions, conflicts, and controversy are inevitable. Loud and vigorous opposition may come from large groups, but also from smaller groups that are not necessarily representative. 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 opinion. Regulatory decisions in the public interest frequently are unpopular and met with some political resistance, although still regarded as legitimate and even necessary. The 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 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 academic studies and colloquia, may have particular value. Although commission decisions must be supported within "the four corners" of an evidentiary record, based on the merits and constructed in accordance with due process, methods exist to give notice of pertinent extra-record information to all parties.

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 speaks 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,"[73] the benefit to the public interest that derives from maintaining "good working relationships,"[74] 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."[75] Regulators are judged not just by the

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

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

74. *Id.*

75. *Id.*

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 evolved 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. Responsiveness of policy to rapid economic and technological change may not be suited to the often plodding pace of adjudication. The development of 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 less constrained procedures of alternative dispute resolution.

The adaptive modernization of regulation is not cause to abandon fundamental principles. Technical complexity does not justify exclusion 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 informed. Diversity enriches the record by which policy decisions are made. Commissioners are well advised to place a priority on engaging 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 mentorship can accelerate the learning curve and 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 creatures 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 effective in their role.[76] Recruiting qualified

76. A caveat from the "capture" theory of regulation is that longer serving commissions may become more independent politically, but less independent from industry because their perspectives begin to align.

and committed candidates to the position 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,[77] and possibly eligibility criteria or guidelines.[78] Nominees might also be evaluated in a process modeled after the rankings of judicial nominees by the American Bar Association, though not confined narrowly to judicial competencies.[79]

Once on the job, commissioners should be socialized into the roles of expert, trustee, and judge and supported through mentoring and academically grounded continuing education that includes meaningful training in judicial skills and ethics. Attention to appearances is as important as understanding the rules. 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 inquiry and peer review. University centers and other third-party neutrals could be used to help facilitate the open, inclusive, and balanced exchange of ideas in 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.[80] Finally, an exit policy for regulators that places proper time and distance from direct or indirect engagement with regulated companies after their service, perhaps more separation than required under current practice or transitional assignments in the public sector, will help ensure independence during their service.

IV. REGULATORY ETHICS

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

By virtue of their roles and responsibilities, expectations of regulators are particularly 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

77. In Ohio, a Public Utilities Commission 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 Commission. FLA. STAT. § 350.031 (2008).

78. 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).

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

80. Rules and procedures exist for disbarment, but not "de-commissioning" of this sort. 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.

citizens in their Government."[81] 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.[82]

Changing roles and responsibilities, 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, high stakes call for more care. While some may be *situational,* and their application to particular parties may be *conditional,* the imperative of ethical conduct for all participants in the regulatory process is *absolute.* Justice Potter Stewart's definition of ethics as "knowing the difference between what you have a right to do and what is right to do" [83] pertains.

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 cause prejudice or tempt abuse of position or authority for political or personal gain. Conflicts are not uncommon;[84] acting upon them may constitute the impropriety. Conflicts may be managed through full disclosure, removal, or mitigation (*e.g.*, recusal), but perceptions of conflict tend to cast doubt on integrity.[85] In public life, perception becomes reality and as relevant as the letter of the law, as even the Court acknowledges: "justice must satisfy the appearance of justice."[86]

Knowingly or not, regulators routinely face moral and ethical quandaries. Not every circumstance is unambiguous and not every encounter constitutes compromise or violation, but sensibilities and judgment are continually tested. Partisan loyalty is tested, reciprocation is expected, and political pressures are felt by commissioners but also by staff policy analysts and expert witnesses. Outside information makes its way in, and inside information makes its way out. Electronic mail is exchanged, conversations take place, and disclosures are advertently and inadvertently made. Friendships and romances form and indiscretions occur. Private parties and their agents host events of all kinds and destinations that enable, in lobbyist parlance, "troughing" by guest public officials. Travel and speaking engagements are arranged. Meals, entertainment, tickets,

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81. 18 C.F.R. § 706.101 (1996) (emphasis added).

82. N.H. ETHICS POLICY, *supra* note 73.

83. John Wang, Data Mining Opportunities and Challenges 398 (Idea Group, Inc. 2003).

84. All regulators, for example, are utility customers. 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.

85. 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.

86. Offutt v. U.S., 348 U.S. 11, 13 (1954). Quote recommended by Lynn Hargis.

invitations, gifts, donations, endorsements, campaign contributions, and employment opportunities are proffered.

Independence and ethics are guarded only by constant vigilance precisely because so many forms of influence are amorphous and inconspicuous. Flagrant ethical violations, by comparison, reflect the conscious choice *by both the corrupters 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 and explicit *quid pro quo,* a duplicitous transaction that sells out the public interest for a price measured in private gratification or enrichment. Culpability is shared by 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.[87] Opportunities and pressures are ever present in modern life, but rationalization is 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 flaws of character, including narcissistic, mendacious, or compulsive proclivities, as well as conformity. Some may possess a false sense of impunity or feel deserving of privileges 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 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 and transgression 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 comes easily to those with a genuine fidelity to public service and 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, armed by requirements for openness and freedom of information, provide oversight as well. Civil and criminal penalties for noncompliance provide deterrence, as well as punishment.

Ethical behavior is fostered in organizations that place priority and clarity on ethics. The strategic plan developed by the Nevada Public Utilities Commis-

87. 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].

sions 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."[88] 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."[89] The New Hampshire Public Utilities Commission vows "[t]o perform our responsibilities ethically and professionally in a challenging and supportive work environment."[90] The FERC seeks to "maintain the highest level of professionalism and an environment of fairness, trust, respect and honesty."[91] The ethics bar is set not just high, but highest, for regulators because of the responsibilities of their positions and impact of their decisions.

Regulators who hold themselves to high standards can 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 easy. The unwavering commitment to ethics must permeate the organization, with commissioners and staff working together to maintain 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 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.[92] Governmental ethics offices or commissions may provide oversight, as well as advisory opinions. Perhaps a sign of the times, agency managers can access an expanding network of resources on ethics.[93]

Ethical challenges can test managerial skill and political will. The unspoken and unenviable demand on executive managers to embody the agency conscience and police, not only subordinates, but superiors, presents managers with an especially thorny ethical challenge in itself; looking the other way may be tempting when professional survival is at stake. Commissioners may also find themselves policing each other, informally or formally.[94] Ethical violations

88. 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).

89. MISSOURI PUB. SERV. COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2007-2012, http://www.psc.mo.gov/about-the-psc (last visited Sept. 14, 2008).

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

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

92. 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 87.

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

94. In 2003, four members of the Arizona Corporation Commission called on a fifth member to resign, citing a "pattern of misconduct" that stood to "undermine the public's confidence" in the agency. Particulars included a sixty million dollar judgment against the commissioner for attempted influence, as well as inappro-

stress 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."[95] 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; annual and other financial reports of utilities; maps and data; and commission 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 balanced against propriety and security, and 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 restrict commissioner-to-commissioner communications, defining "meetings" narrowly and prohibiting, for example, any assembly of a majority of a commission's quorum. The rules often allow for closed meetings under special circumstances, such as *en banc* discussions of sensitive matters related to national security, liability, litigation, personnel, or labor; meetings with agency auditors; real estate purchases; issues having the potential to violate privileges or breach confidentiality; and major pending decisions that have the potential to move financial markets. Educational and professional conferences attended by the commissioners are also generally exempt. Meetings between decision makers and interested parties, and other forms of communications, are governed by

priate 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. In 2005, the Minnesota Public Utilities Commission 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 (PUC Order Dated 10/7/2005).

95. Carl Manning, *Lawmakers Propose Change in Closed Door Policy,* TOPEKA CAPITAL J., Jan. 30, 1999, *available at* http://findarticles.com/p/articles/mi_qn4179/is_19990130/ai_n11717810.

ex parte regulations. The public is always wary of closed-door meetings between the regulated and the regulators.[96] 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 and one-sided opportunity to argue 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 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 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, both the public and the parties of interest, but 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 for 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"[97] because it affects the quality of both process and outcomes, including the paradoxical consequence of advantaging special interests (who attend open meetings) over the general public (who do not).[98]

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 infractions can be spun into larger ones 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, particularly with respect to accountability in the face of unpopular decisions and difficult policy choices. Some concessions to the judicial mode 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

96. 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).

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

98. *Id.*

trust that comes with a high degree of openness. The prudent regulator accepts willingly the burdens and obligations of due process and open government.

C. Codes of Conduct

Federal, state, and local public officials are obligated to abide by the rules attached to their positions. 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.[99]

The particular rules of conduct and exceptions to them can vary widely by jurisdiction, as well as type of proceeding.[100] 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 to 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. Statutes and rules also specify a procedure for filing complaints and imposing sanctions.

The specified rules of conduct for regulatory commissioners and members of the staff generally fall within three areas: conflicts of interest, communications, and corrupting influence. A fourth area includes high crimes, general misdemeanors, and acts of obvious immorality that fall under criminal and civil law and social mores. These transgressions reflect risky behavior and poor judgment, and justifiably cost public officials their jobs and reputations.

Conflicts of interest arise from private interests or obligations that compete with the regulator's obligation to the public interest and impede the impartial 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.[101] North Carolina commissioners, for example, submit to the State Board of Ethics a statement of economic interest subtitled the "Long Form."[102] Misdemeanor charges and fines 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

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

100. 5 C.F.R. § 2635 (1992).

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

102. NORTH CAROLINA STATE ETHICS COMM'N, https://www.ethicscommision.nc.gov (last visited Sept. 8, 2008).

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.[103]

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 impede the regulatory process, particularly for commissions with few members. Regulators usually are not permitted to hold other positions of public or private employment,[104] sit on governing or oversight boards, provide endorsements or promotions, or engage in activities for honoraria or other remuneration except for certain academic pursuits (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 prejudgment.

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.[105] Prohibitions on ex parte communications between parties of interest and commissioners are designed to prevent undue influence on decision-making, and thus outputs and outcomes; the rules may or may not apply to interests that are not formal parties. Communications among the commissioners themselves may also be subject to the open meetings rules or limited to conversations among no more than a majority of a quorum. Regulators may need to provide notice of extra-record information that may play a role in the decision process and additional rules may pertain to how that information is acquired. Concerns about bias and prejudice also limit communications. Regulators must be cautious about leaking or telegraphing information prior to a final decision, not just to parties, but to interested observers (such as the 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 and readily discoverable.

The third general area concerns *corrupting influence.* The Oklahoma Constitution section forty 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."[106] The rules here go

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

104. 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://depsc.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_opporuntities.stm (last visited Sept. 12, 2008).

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

106. OKLA. CONST. art. IX, § 40, Somewhat ironically, the Oklahoma Corporation Commission was embroiled in a notorious six-year federal bribery investigation and sting operation involving cash payments and

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.

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;[107] 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.[108] Gifts can present a special challenge for new regulatory regimes because of close social networks and prevailing cultural norms.

Educational programs, association participation, and diplomacy all entail travel and compliance with travel policies that may include spending constraints and pre-approval by oversight bodies. Traveling to gatherings and conferences with significant industry presence, particularly with financial support from parties of interest, always calls for both knowledge of rules and sound judgment.[109] Where regulators go, industry follows. Excessive, distant, and international travel, no matter how noble the purpose, may more than annoy local constituents. Extravagance is at odds with the spirit of public service and the more lavish or exotic the event or locale, the greater will be the boondoggle perception. Seclusion is also not conducive to inclusion. Conference and event organizers must respect ethical boundaries and be sensitive to appearances, as well as to the burdens of participation relative to the obligations of open government. Even differential registration fees for industry and government can be scrutinized. Ideally, governments will support travel by public officials for government business. A possible, and surely unintended consequence, of fiscal constraints and spending restrictions is the need for public officials to seek travel stipends or sponsorship that may invite conflict.

Employment issues raise both policy concerns and practical dilemmas. In many jurisdictions, employment restrictions are designed to slow the "revolving

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recorded conversations, and resulting in fines and prison terms for a former chair and a former general counsel. *Anthony Celebrates 10 Years at Corporation Commission*, J. RECORD, Jan. 11, 1999, *available at* http://www.bobanthony.com/articles/news-journalrecord-11jan99.htm.

107. DOYLE, *supra* note 105.

108. 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.

109. 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, Federal Communications Commission (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.

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 related cases.[110] The law firms of attorneys appointed to the commissions may need to suspend their regulatory practice. Following their service, a "stay-out" or "cooling-off" period (often one year) may restrict commissioners and in some cases professional staff from working for companies or their counsels.[111] Invoking the theory of capture, at serious issue is whether employment prospects influence the behavior of regulators while on the bench.[112] Especially egregious, of course, is the offer of employment to a sitting commissioner by any party that has an implicit or explicit expectation of favorable regulatory treatment.

Employment presents a particular dilemma because the potential for conflicts of interest increases with policy specialization and the limitations it places on career advancement. Regulators gain valuable expertise that correlates with particular employment opportunities and earning potential, and transferability to other endeavors is constrained. 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 regulators back on the job market; some are enticed to leave public service before completing their terms for more lucrative private sector positions. If only persons approaching retirement were eligible to serve, job-seeking behavior might be curtailed but the pool of candidates would be demographically narrowed and skewed. Employment 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 a position of authority.

D. Personal Responsibility

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.[113]

Laws, rules, and consequences are clearly necessary but not sufficient to ensure ethical behavior. No code of conduct, or mechanism of accountability, can

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110. Former company employees might be perceived as "infiltrators," but having relevant expertise and experience they are probably as likely to be well-informed and effective regulators.

111. *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).

112. To be fair, reappointment prospects may also exert influence of the political variety.

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

substitute for genuine dedication to public service coupled with an inherent sense of personal responsibility for ethical behavior.[114] Simply put, "[t]he prospects for ethical government are greatest when there are selfless public officials."[115] Attention to one's own behavior is a form of personal self-regulation and a recognition that choices about individual conduct matter and have consequences not confined to the individual. Although incompetence does not constitute impropriety, understanding of rules is a measure of professional proficiency and ignorance can be 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, particularly designated ethics officers, but never laying blame for missteps on personal, legal, financial, or other advisors. Personal responsibility means exercising sound judgment and erring always on the side of caution.

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 or punishment, but by the obligations of 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 public 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 they are discovered and managed. Humans make mistakes, and honest ones often can be remedied, and even pardoned, if accountability is accepted without hesitation. In American political culture, it often is not the original imperfection or infraction that takes down the mighty, but the hubris, denial, deception, obfuscation, and obstruction of justice or "cover up."

A thought experiment to "scare straight" the wondering conscience is to consider the worst that can happen. The fall from grace hits hard and poor choices can be truly self-destructive. Public officials who violate the rules of

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114. 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 this point few would find disagreement with Mr. Lay.

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

ethics may pay a high personal price, including the loss of position by removal for cause and the possible loss of personal freedom by jail time.[116] The accused may incur legal expenses and monetary fines, and also acquire a criminal record. 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 and gossip both spread rapidly in the regulatory subculture. The media's glare can be unrelenting, unforgiving, and indiscriminate. The rumored peccadillo will appear in large print as a "possible violation of the ethics rules" and circumstantial evidence will 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. Recovery becomes virtually impossible and legacies are tarnished permanently.[117] It is not unusual for the obituaries of disgraced public officials to revisit the offense.

Organizations share scandals with the offenders within. In the aftermath of an ethical storm, the normal processes and proceedings of government are disturbed for all participants. The resulting uncertainty and instability reflects poorly on the regulatory environment, which can be costly. Scandals distract, detract, and redirect attention away from issues of substance and import. Small breaches may still trigger broad and potentially disruptive investigations. The result can be the imposition of well-intended but possibly cumbersome rules, and the loss of discretion or constraints on the deployment of agency 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 using social responsibility screens may balk. Calls for improved corporate governance and accountability may come from shareholders, auditors, and rating agencies, as well as the public sector.[118]

Ethical negligence breaks the covenant of independent regulation in the public interest, including the promise of basic fairness under the social compact. The institutional independence 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. Violations of trust erode regulation's authority and legitimacy, leading to institutional contestability and possibly threatening institutional sustainability. The efficacy and social value of regulation are eventually weighed against the alternatives, which include its demise as an instrument of policy no matter how

116. Detroit's Mayor Kwame Kilpatrick provides a case in point.

117. New York Governor Elliot Spitzer provides another case in point.

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

essential to the public interest.[119] The prudent regulator accepts accountability for individual choices that have profound institutional implications, and is thus deserving of the public trust. For independent regulation, there may be no greater imperative.

V. EPILOGUE: PRACTICAL ETHICS FOR THE PRUDENT REGULATOR

At the risk of saying what should go without saying, a number of practical suggestions can be commended to the prudent regulator:[120]

1. Think and talk about ethics, particularly before problems arise.
2. Create and maintain an ethical organizational environment.
3. Lead by example and command respect by maintaining boundaries, integrity, and appropriate demeanor.
4. Attend ethics training, programs, and discussion forums.
5. Complete the ethics and accountability statements and practice full disclosure (financial, information issues, gifts, etc.).
6. Avoid conflicts of interest by limiting extra-commission activities and manage conflicts appropriately (disclosure, etc.).
7. Adhere to campaign finance rules (elected commissioners).
8. Understand that responsibility for knowing and complying with the rules is yours alone and never rely to define the boundaries of your behavior.
9. Know your professional standards and applicable canons (*e.g.*, the Bar, NARUC).
10. Do not compromise your personal ethical values or become complacent over time.
11. Respect the ethical choices of your colleagues and staff.
12. Understand and follow the rules and procedures of your jurisdiction.
13. Know how rules vary for different roles, proceedings, and venues.
14. Regard the written rules as minimal requirements and err on the safe side.
15. Sharpen and trust your instincts about conflicts of interest and situations requiring ethical judgment.
16. Recognize the biases and interests of yourself and others.
17. Do not prejudge issues that may come before you, or make prejudicial statements or endorsements.
18. Do not act in an advisory capacity to regulated interests or other stakeholders.
19. Be cautious about telegraphing your policy preferences or decision intentions.
20. Participate in neutral educational and professional forums.
21. Be discerning about information and its sources and influences.

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119. The decision to deregulate must be informed by a determination of workable competition; regulatory failure in the form of unethical conduct is an insufficient justification for removing vital regulatory safeguards in the context of persistent market failure (*e.g.*, market power and other intolerable imperfections).

120. 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.

22. Recognize when you are being lobbied, pressured, flattered, or bamboozled.

23. Be cognizant of third parties and agents of interest (*e.g.*, attorneys, analysts, consultants).

24. Keep in mind that the *quid pro quo* may not be entirely obvious.

25. Learn when and how to say "no" to inappropriate requests.

26. As appropriate, be openly accessible to all constituents.

27. Be fair and open minded; welcome diverse perspectives.

28. Write emails as if they are public, publishable, discoverable, and unprotected by attorney-client privilege.

29. Be aware of appointment and phone records of all types.

30. Have a witness present at meetings and keep notes.

31. Be cautious about industry friendships and do not solicit or accept favors.

32. Travel judiciously and responsibly, and comply with travel rules and oversight.

33. Be knowledgeable about the rules of event sponsorship.

34. Know who is picking up the tab and pay your own way whenever appropriate.

35. Return inappropriate gifts or gratuities and keep records of doing so.

36. Establish trust with oversight bodies (*e.g.*, legislative committees).

37. Plan and prepare for an appropriate career path.

38. Be cautious, but open and positive, when interacting with the media, respond effectively to media inquiries, and rely on your media experts.

39. Remember the little stuff, but also comply with the "big stuff" (*e.g.*, pay your taxes, drive sober, do not commit harassment, etc., etc., etc.).

40. Do not rationalize borderline behaviors, even if occasional or seemingly minor.

41. Do not practice denial, defensiveness, indignation, or obfuscation.

42. Seek advice from the ethics officer; do not self-advise, interpret, or guess.

43. Come clean quickly and completely about accidental breaches; do not obfuscate or attempt to spin.

44. Learn from your mistakes and those of others.

45. Be aware that in public life appearances matter more than technical violations.

46. Know that political gossip and scandals tend to spread; economic regulation takes place in a relatively confined subculture.

47. Take a long-term view because memories are long and recovery from scandal is difficult.

48. Consider the newspaper headline and whether you can live with it.

49. Look in the mirror and make your [spouse, mother, and/or kids] proud.

50. Keep sight of your obligation to the public and the public interest at all times.