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THE REGULATORY PRACTITIONER

JOHN F. COONEY

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I want to thank Professor Cary Coglianese, the Faculty Advisor to RegBlog, for inviting me to serve as the inaugural keynote speaker at the First Annual Regulation Dinner hosted by the Penn Program on Regulation to mark the transition of RegBlog's editorial board.

Tonight, I want to describe for you what it is like to be a regulatory practitioner. I understand that some of the guests are not law students and are interested in understanding how non-lawyers may make a career in the regulatory process, such as in trade associations or non-governmental organizations. Accordingly, I will describe the regulatory process broadly for those of you who are lawyers and those who are humans.

UNDERSTANDING THE REGULATORY PROCESS

At the outset, I think about the regulatory process from three broad perspectives that have ramifications for anyone working as a regulatory practitioner.

First, the United States government is the most complicated social organism ever developed by human beings. The job of regulatory practitioners is to study how this organism functions and work with it to try to reach intelligent policy decisions.

Second, I think of the regulatory practice as the Queen of the Social Sciences. It is the discipline that gets to put all the other social sciences to

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[†] *John F. Cooney is a partner at Venable, a Washington, D.C.-based law firm. He previously served as an Assistant to the Solicitor General in the Department of Justice, Deputy General Counsel for Litigation and Regulatory Affairs in the Office of Management and Budget (OMB), and counsel for OMB's Office of Information and Regulatory Affairs.* *He delivered the Penn Program on Regulation's Inaugural Regulation Lecture held at the University of Pennsylvania Law School on February 28, 2012.*

work, and is the discipline that draws most heavily on all the areas you have studied and loved in school. Society regulates many complicated phenomena—the air we breathe, how financial institutions operate, what stem cell lines can be used in medical research. To do the job well, a regulatory practitioner has to be proficient in all the social sciences: law, economics, political science, sociology, psychology, journalism and media; and has to be able to learn something about the physical sciences, especially chemistry and physics, to develop persuasive arguments. The job of the regulatory practitioner is to take the insights from these other disciplines and figure out how to develop the best arguments and explain the matter to both experts and laymen alike.

Third, the regulatory practice is the field where law, policy, politics, and media/public relations come crashing together. I say "crashing together" because the outcome of the process is about power and money, and the people in the process are well-educated, highly experienced, and fight very hard for their positions. In order to be effective, the regulatory practitioner has to master each of these disciplines. You also have to be able to work effectively in many different forums—with the agencies, in the courts, before Congress, and with the media—and you have to understand how to translate your core arguments so that they work within the different cultures and attention spans of these institutions.

In addition to these broad observations, in personal terms there are two other aspects of the regulatory practice that are important to understand. First, the job of a regulatory practitioner is enormous fun. How many other jobs pay you to read the newspaper first thing in the morning and react to what you learn? Doing just that is a key part of the profession.

Second, the job presents constant intellectual challenges. Beyond developing the skills to master diverse subject matters, the most important factor you learn is that people locked in policy battles generally have good reasons for their positions, based on their perspectives. The Washington truism often used to describe this phenomenon is, "Where you stand depends upon where you sit." To be effective, the regulatory practitioner must be able to figure out what part of another person's position reflects a legitimate policy view and determine if it can be accommodated, and how best to do so.

I learned this lesson while working on the spotted owl controversy, which presented the question whether harvesting of first growth forests in the Pacific Northwest should be prohibited under the Endangered Species

Act to protect this bird population. The focus of the debate was on spotted owls, not because they had previously been considered a bellwether indicating the health of the forest ecosystem, but because they could be counted. A lonely forestry graduate student doing his fieldwork had learned how to hoot so that spotted owls would come to his campsite. The Forest Service later generalized the phenomenon by creating a separate job category for hooters who were hired to call the birds. Since they could be counted, the birds served as a proxy for what was happening to the forest.

As a resident of an Eastern city, the original proposal that greatly restricted logging seemed like a reasonable, if indirect, way to protect a valuable natural resource through the fortuitous presence of an endangered bird. I soon learned that the forest had a different meaning for families in Oregon who had decided 50 years ago to preserve a stand of trees for harvesting so that they could finance their grandchildren's college education.

Once these competing perspectives were understood, progress could be made toward a resolution.

WORKING WITH REGULATORY AGENCIES

For a practitioner, the most creative part of the regulatory process is in discussions with the agency that has been delegated authority to implement a statute. The discretion and flexibility, the ability to solve problems and accommodate conflicting interests, is greatest at this stage of the process. In planning presentations to the agency, you can draw on your entire education to develop policy arguments, based on any discipline you have studied, or drawing analogies from other areas in which you have experience.

In every matter, in whatever forum, the two basic questions a regulatory practitioner must be able to answer are: What policy should the country adopt to govern itself most effectively and fairly? And how can I present my ideas about the proper policy to command popular support?

Until you have worked in the regulatory process, it is impossible to understand the extent to which policy-making is idea-driven. The media tend to cover the political aspects of the policy process but downplay the battle of ideas. But good ideas ultimately drive policy, and an important aspect of the work of a regulatory expert is to develop strong arguments

and then figure out how to sell them in the various forums and to the many different constituencies that are involved in an issue. The ideas must be able to survive stress testing by hostile experts and attacks by self-interested entities that will do anything to produce a favorable result. To maximize the chances of success, the regulatory practitioner must identify the moral high ground on an issue and develop effective policy arguments that occupy that ground before her opponents try to do so.

One of the great intellectual challenges for the regulatory practitioner is to develop ideas that will show the senior agency and White House officials how best to accommodate conflicting interests. It is difficult to overestimate how intertwined economic and social issues are and how complex regulatory issues can become. All actions have consequences, many of which are unanticipated. Like a law of regulatory thermodynamics, actions generate reactions. The consequences often are unintended and have to be solved on the fly by trial and error.

The best current example of the complexities that can face a regulator, and the constant mutation of the problem to be solved, arises from bank regulation in 2008, after federal regulators decided they could not rescue the financial institution Lehman Brothers. One family of money market funds was overly concentrated in Lehman commercial paper, and "broke the buck," or traded for less than $1 per share. No regulator had the information to foresee this offshoot of the Lehman bankruptcy, which prompted massive withdrawals from other money market funds. The loss of liquidity threatened to disrupt the entire world financial system. In response, the Department of the Treasury and the Federal Reserve quickly improvised a program that essentially nationalized the money market industry and guaranteed depositors that their shares could be redeemed for $1 per share.

Simultaneously, other parts of the capital markets seized up due to the large capital losses being experienced as the bubble collapsed and the inability of market participants to determine if their counterparties were still solvent. A full-fledged liquidity crisis developed.

Months previously, the Federal Reserve Board had anticipated this problem and had directed its economists to develop contingency plans that considered what assets the most important financial institutions held, which assets it lawfully could accept as collateral against central bank loans, whether the institutions would be willing to pledge those assets, and whether other institutions would regard such pledges as a sign of weakness that would cause a run on a bank that took such a loan. The

Federal Reserve staff developed a series of programs that met legal requirements for lending against different types of collateral. When financial pressures started to spread from institution to institution, the Federal Reserve was ready to roll out these programs.

At the same time, other federal financial regulatory agencies worked together to force the country's largest financial institutions to accept a direct government cash infusion and agree to extensive regulation by the Federal Reserve as bank holding companies. The government accomplished this mission at the same time it was called upon unexpectedly to nationalize Fannie Mae and Freddie Mac, to prevent disruption of the entire mortgage market, and to rescue the insurance firm AIG to preserve the derivative market.

The loan programs and regulatory programs worked. The Federal Reserve had correctly determined what assets the major banks had that would still have market value in a crisis and how a discounted loan against those assets could generate the funds necessary to keep the institutions afloat.

The Federal Reserve regulatory staff was the real hero of the crisis.

WHAT IS IT LIKE TO BE A REGULATORY PRACTITIONER?

On a personal level, I believe that the best reason to become a regulatory practitioner is that it teaches you about how the world really works.

I grew up in a remote area: Central Tennessee at the end of the era of *de jure* segregation. I have been able to use regulatory work to learn how humans in different and much larger settings organize themselves to try to solve complicated problems. I do not know who I would be without what I have learned through the regulatory work about how people act and how they try to accommodate conflicting interests and institutions.

Sometimes I might agree with the lyrics of an old Bob Seger song, that "I wish I didn't know now what I didn't know then." But some examples of the projects on which I have been fortunate to work will show how a regulatory practitioner's life is a constant learning process about a complex world.

Zebu Burgers

In the 1980s, the federal government sought to support the countries surrounding Nicaragua in the campaign against the Sandinistas by giving them a valuable quota to export beef to the United States. Unfortunately, the countries did not raise beef cattle but did have another bovine, zebu, which is similar to beef. As a result, the import regulations were amended to define "beef" as including zebu from these two countries. The major hamburger chains were the major purchasers of zebu. I learned that when I ate a 100% beef hamburger, that statement was true—in the regulatory sense of the term "beef."

The Undocumented Alien Children Education Case

In the late 1970s, Texas first experienced large state outlays for undocumented aliens. The Texas state government was largely funded by sales and property taxes, which illegal aliens could not easily evade. Nonetheless, the state decided to bring a lawsuit to establish the right to deny benefits to people who could not produce documents proving that they were lawfully present in the country.

The largest category of expenses was for emergency room treatment, but the state decided not to assert a right to deny medical treatment to persons who could not prove legal residency status. Instead, the state fell back on the second largest category and claimed a right to deny a free public education to undocumented alien children. This choice proved vital to resolution of the ensuing lawsuit, which challenged the denial of education on equal protection grounds.

I filed an *amicus* brief in the Supreme Court in support of the children's right to an education, and then learned the difficulty of coalition building. The two civil rights groups that would present oral argument in the case did not get along, and their staff members were precluded from scheduling meetings with each other. I learned that if I separately invited each group to my office at the same time and did not inform the representative that the other group was coming at the same time, then under their rules of engagement the members of the two groups could stay and tell me what their position would be, as the other group listened. This artificial arrangement, which was like a scene from a situation comedy, worked—it was how we planned the winning strategy in *Plyler v. Doe*, a

1982 decision that remains the principal case defining the rights of undocumented aliens.

The case ultimately turned on our ability to show that a majority of the undocumented alien children had been born here and were therefore U.S. citizens who had the right to remain permanently. We persuaded five Justices that denying these students an education because their parents had immigrated illegally would visit the sins of the parents on the children and deny them equal protection compared to peer-citizen children with documents. We also showed that keeping these children out of school would saddle the United States with a large underclass that would have no options in the modern world and would harm our ability to compete with other countries. We called this secondary argument a "pitch outside the strike zone"—an argument that would help persuade the Court, but that we did not expect to see in the opinion, and whose function would be to set up our equal protection argument.

The French Government Resembles the Federal Government.

I helped the French government defend itself in a criminal investigation in which the United States was considering the indictment of an instrumentality of the French State for a formerly state-owned bank that had failed a decade previously, been refinanced by the French government, and subsequently privatized in a manner that made French taxpayers liable for any fines.

I had the rare experience of working inside the French government with staff of the Ministry of Foreign Affairs and the Ministry of Finances. While in the federal government, I had helped address disputes between the Departments of State and Treasury. I learned that the dividing lines between agencies in these two governments were exactly the same and that relations between the French Ministries were troubled along exactly the same fault lines as for their U.S. counterparts. The foreign relations professionals regarded the finance experts as people who only valued life in monetary terms, and the finance professionals regarded diplomats as people who represented the point of view of foreign countries, rather than advocating for their own country to foreign states. I came to realize that this was because the agencies were given the same microscope with which to view the totality of human behavior and operated under the same intense parliamentary and media scrutiny.

The French agencies also wanted the same type of advice from their lawyers as did U.S. federal agencies, but there was one major difference. The French ministries assured me that their civil servants never leaked, and they never did. U.S. government lawyers have to pull their punches in providing written advice to their clients, for fear it will show up some day on the front page of the *Washington Post*. I had the thrill, for once in my life, of being able to tell agency policy officials what I really thought, a luxury afforded to no regulatory lawyer in the U.S. federal government.

Ketchup is a Vegetable.

Government decision-making is a human endeavor, which means policy can be decided on criteria very different from abstract logic. In the early 1980s, many people asked how the regulatory review program established by President Reagan could possibly have cleared a final rule from the Department of Agriculture that declared ketchup to be a vegetable for purposes of providing children in the school lunch program a healthy meal. I learned how.

The OMB staff initially flagged the Agriculture rule for review because tomatoes are a fruit, not a vegetable. There were problems with the rule, but that was not it.

Seven people gathered in the Old Executive Office Building for the policy review – a young female special assistant to the OMB regulatory czar and six principals. Each of the principals was named Jim. OMB sent Jim Miller and Jim Tozzi; Agriculture sent its general counsel and his deputy, both named Jim; and the White House sent two Jims. The special assistant's notes were an extended "Who's On First?" routine. The discussion went: "Now wait a minute, Jim, when Jim and I had lunch, Jim said that Jim had no problem with this." "When Jim and you had lunch?" "No, when Jim and I had lunch." "And Jim had no problem?" "No, I hadn't heard back from Jim, I had only heard from Jim, and he was fine with it." After two hours of discussion, the principals made no progress in figuring out the problems with the rule and cleared it for signature.

A few days later, they found out what the problems were the hard way—when they read in the newspapers about the political controversy that erupted over the rule.

If You Are Interested in the Regulatory Process.

In the final analysis, all regulatory issues ultimately raise the same issue – how do human institutions try to solve problems under stress and in the public eye?

I never tire of learning about the complexities of this decision-making process, and I have been able to keep my passion for the public policy process through good projects and bad, and through good clients and bad. If I could hit the Reset button and start over again tomorrow, I would. At some point early in my working life, I found that regulatory work was the most direct way I could use my education to promote the public interest. That choice can lead to a really interesting life.

Anyone who has volunteered to contribute to *RegBlog*—or who regularly reads its content—is at least a carrier of the same syndrome that I have. So I would encourage you to think about whether you would like to try working in the regulatory sphere. If you do, there is no substitute for going in government for a time, relatively early in your career, to learn about the decision-making process inside the belly of the beast. Government work provides a real opportunity to develop your own decision-making style and learn what approaches work best for you in different situations. It also provides a large enough number of problems to develop your skills and the freedom to make your own mistakes and learn from experience.

There is a tangible satisfaction from government service. Every day as I rode to work, I knew that I would be serving the public interest, no matter how hard that was to see from the trenches. I contrasted my experience with that of a friend from law school, a litigator who reported to work at a prestigious law firm and was assigned to help defend the flammable wheelchair. One evening spent listening to his stories about the litigation taught me how I wanted to approach professional life.

I hope my words about the experience of a regulatory practitioner will help persuade you to consider entering the regulatory field as an approach to learning the world and pursuing your interest in getting public policy right.
