Luncheon Session

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Luncheon Session

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CORNELIUS KERWIN**

COMMENTS OF ANDREW F. POPPER

Dean Popper: Good afternoon. On behalf of the Dean, the faculty and the students of The American University Washington College of Law I would like to welcome you to this very special program. Before I introduce Dr. Neil Kerwin, Dean of the School of Public Affairs, I thought I would give you a snapshot of a few currents in legal education.

Perhaps the most startling current is that many faculty members at law schools throughout the United States have challenged the very foundation of legal educational pedagogy. The movement or theory most often blamed for shattering the harmony (or perhaps complacency) of faculties is Critical Legal Studies, or CLS. CLS devotees demand that law schools de-emphasize doctrine, acknowledge sexism and racism in legal education, teach history and philosophy, and reconsider comprehensively the very process of classroom teaching. Stated bluntly, the Crits contend that law school teaching methods engender classism, elitism, and intellectual vacancy.

As a conventional classroom teacher, I believe that we have an obligation to provide a setting for understanding legal doctrine. We have also an obligation to create an environment where criticism and evaluation of the legal system are central to the learning of each student. We have an obligation to teach legal theory and jurisprudence, a duty to teach history, philosophy, and literature, and a responsibility to allow for a forthright assessment of the successes and failures of the legal system.

While Critical Legal Studies exists primarily as an academic critique, another current, clinical legal education, has had a much more profound affect on student learning. Clinical programs have come of age and now begin their third decade. Clinics are an essential part of every effective legal education program. Through clinics we satisfy our obligation to teach practical lawyering skills. Beyond this task, clinical

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programs permit students to examine those components of lawyering that have intensified hierarchies, separating lawyers from clients and judges from parties. Through our classrooms and clinics, our task must be to demystify the legal system, not to retain the shroud of unneeded complexity woven carefully over the last century of law school teaching.

Our clinics must examine the very practice of law, much as our classes must examine the substance and process of the legal system. Our clinics must foster an intelligible critique of our current system of lawyering, a system that provides legal services to the wealthy or to those charged with the commission of crimes. Our classrooms must also be a center for challenge. For example, it is no longer acceptable in teaching Administrative Law to focus on traditional rulemaking and adjudication when it is obvious commanded control regulation has failed to achieve fundamental health and safety regulatory objectives.

The administrative processes studied at this program today were created and implemented by lawyers who went to law school at a time when institutional hierarchies were fundamental, when professors taught from elevated platforms in standing positions, when students were belittled, when students rose to speak and then sat quickly. These methods trained generations of lawyers in distancing and de-contextualizing. They allowed law students to see the law as something detached from reality, rather than to see the law as a mechanism for problem-solving.

We have perpetuated that system too long. It has permeated every aspect of the legal social order. It is time for law schools to rethink the basic modes of instruction. Whether this rethinking occurs in the hostile environment that has been created at Harvard Law School, or whether it can be rethought in an environment where intellectual inquiry is matched with empathy is a question each law school must answer.

Law schools succeed when they facilitate criticism and when criticism is honored as essential to improving the legal process. Law schools succeed when students leave understanding how to practice law and understanding the favorable and oppressive aspects of each doctrine they are asked to assimilate.

Law schools fail when they convince students that the law they are learning is right or natural. Law schools fail when they convince students that law professors are the sole providers of knowledge and wisdom.

Today’s program demonstrates that the task of rethinking going on in law schools is also taking place at the highest level of the Bar. It is
up to you in a program like this to challenge, not simply to accept. You must ascertain whether the information you are receiving today should be "accepted" because it comes from someone standing up in front of the room whose title suggests that they are people of authority and wisdom. In my opinion, our speakers are people of great wisdom, some with major public responsibilities, but they are not always right. I guess if it were 1968 I would have on a button that says: "Question authority within the administrative process." That is your task.

I take the study of administrative law very seriously. I dispute the claim that, as far as law school courses go, it is dry as dust. It is alive and ripe for critique. Administrative law is dynamic and challenging. It is the forum to question the substance of regulation, the question of deregulation, the existence of fair process. Your program does that, and we are proud to be part of it.

I now would like to turn the program over to Dr. Neil Kerwin, Dean of our School of Public Affairs. Dean Kerwin received his Ph.D. at Johns Hopkins University in 1978. He is and has been one of the truly outstanding professors in our government and political science program for more than a decade. He is a noted author in the area of consensual decisionmaking, negotiated rulemaking, and court management. He has studied and written extensively about regulatory practice from the perspective of the political scientist.

Dean Kerwin is engaged currently in a study of rulemaking and will be commenting some on that work. He will also provide an overview of how political scientists perceive the regulatory process and how they use regulatory management.

With that it is truly an honor to turn the podium over to Dean Neil Kerwin.

COMMENTS OF CORNELIUS KERWIN

Dean Kerwin: Thank you. First, let me start by thanking Judge Frye and Ms. Zusman for inviting me to speak to this group. It is not very often that a political scientist gets to address a roomfull of attorneys. My remarks will be relatively brief. I thought it might be useful for me to try to summarize for you the state of thinking in political science and public administration about the regulatory process and then to share with you what I think is a very exciting and emerging field, so new and as yet unformed that it does not have a title per se. Those of us who work within it are attempting to coin one. So for want of a better word, I will use the term "regulatory management."
Political science entered the field of regulatory process in the 1950's, and the symbolic start of that entry was a book published by Marver Bernstein called *Regulating Business by Independent Commission.* It was a book devoted to an agency that by that time was nearly sixty-five years old, the Interstate Commerce Commission (ICC).

The message that it left to the discipline of political science, however, was a rather distressing message. Marver Bernstein had found in his historical analysis that the ICC had gone through several stages in its historical cycle, beginning as an active, reform-oriented organization dedicated to regulating that sector of American industry in the public interest. However, by the time he completed his research, what Bernstein found was an agency that had fallen into disrepair, one that was characterized by "capture" by the very interests that it was designed to regulate.

This "capture" theory of regulation dominated our thinking in political science for nearly two decades. In part, the "capture" theory of regulation in political science has now finally been challenged effectively. It is no longer particularly influential.

To give credit to Professor Bernstein, he was studying an agency of economic regulation which historically has been found to be susceptible more than others to influence by a single, powerful interest and, of course, he had completed his research before we experienced the explosion of interest group activity and social regulation that occurred in the late 1960's and early 1970's and that continues apace today.

Recent theoretical and empirical work in political science paints a very different portrait of the regulatory process. The term "capture" is no longer appropriate. The term "besieged" is. What the best writing in this discipline today focuses on is an attempt to try to categorize, understand, and to some extent predict how the very complex forces that impact on the regulatory process interact to produce regulatory decisions. These forces are familiar to everyone in this room. But let me very briefly review for you what they are and the role my discipline sees them playing in regulatory activities.

First and foremost is the Congress. The Congress is portrayed by my field as the creator of a massive edifice of regulation, most recently social regulation. The pace of regulatory legislation in the 1970's was

2. See id. at 21-73 (relating history of Interstate Commerce Commission).
3. Id. at 21-47.
4. See id. at 73 (noting Commission was out of "large" public control, leaving it under special interest "small" public control).
unprecedented in American history and probably in world history. By one count, which is authoritative, the Congress enacted over 106 separate regulatory statutes from 1970 to 1979. The pace slowed in the 1980's, but many of those basic statutes enacted in the 1970's were amended in the 1980's. This evolutionary process continues today.

These statutes established for regulatory agencies an immense mission with large grants of delegated authority and responsibility. The statutes typically failed to provide those same agencies adequate resources to carry out those tasks.

In addition to very substantial responsibilities and relatively limited resources, we also find that the delegations of authority are often vague, sometimes contradictory, establishing expectations for the public as a whole that are frequently unrealistic.

We find the Congress increasingly resorting to the use of deadlines for the achievement of these regulatory objectives and goals, creating additional procedural and analytical requirements for the responsible agencies, and engaging in constant oversight, incessant legislative correspondence, and case work for their constituents.

At the normative level, many in my discipline do not think well of the Congress in this regard in its relationship to the regulatory process. Some believe the Congress delegates too much and is doing too little in terms of specifying what it wants accomplished, and spending too little to ensure that those things can happen. Some in my field see the Congress as guilty of excessive meddling and micromanagement of programs that are better left to experts at the agencies.

At the empirical level, those who try to study and measure the actual impact of Congress find dramatic effects attributable to its involvement in the regulatory process.

Player number two is the President of the United States. The 1980's, established that when a President chooses to become involved in the regulatory process, he can be very effective. Within months of taking office, President Reagan, as you all know, revolutionized the regulatory process, at least in one important respect, by interposing the Office of Management and Budget in the review process for significant and major rules. Through Executive Order 12,291 President Reagan imposed a "net benefit" rule on new regulations.

The President used his appointment process skillfully to try to

achieve an impact on the day-to-day management of the agencies that carry out these regulatory obligations. The President can be a very important force, but he must be willing to make a substantial investment of himself and his people in order to do so.

Player number three is the judiciary, sometimes a reluctant, but always a formidable force in the regulatory process. The litigation rates associated with certain regulatory programs are absolutely staggering. Currently, the Environmental Protection Agency (EPA) estimates that between eighty-five and ninety percent of all rules it writes are challenged in court. At any one time, the EPA has between 250 and 300 rules under development. Virtually every health standard issued by the Occupational Safety and Health Administration (OSHA) has been challenged in court, usually successfully, in one way or another.

The courts can have a tremendous effect on both the substance and pace of regulatory activity, and this influence has been dramatically reported in research by scholars looking at the EPA, OSHA, National Labor Relations Board, the Federal Energy Regulatory Commission, and many others.

Those three familiar players are joined by two others in the studies of political scientists: interest groups and the bureaucracy. Based on any statistical measure we have available to us in terms of their numbers and activities, interest group activity has exploded. Political action committees have increased by a factor of two thousand percent since 1974. The number of corporate offices maintaining government relations operations here in Washington has increased from twenty-five in the late 1960's to nearly 770 today. It is very difficult to find a Fortune 500 company that is not represented by a dedicated office.

The procedural reforms that the Congress enacted during the 1960's and 1970's and 1980's are tailormade to provide special access to the regulatory process for well-organized interests. This is not a coincidence. Interest groups have become extremely facile at using opportunities to participate and influence, and we have even coined a new word in political science. We are not particularly creative, so when we do this kind of thing, we try to share it with as many people as we can. You're familiar with the term "lobbying"? The new term, coined by Theodore Lowi, is "corridoring." Corridoring is the attempt to walk the corridors of the regulatory process and influence decisions. Again, by available measures we have, interest groups are turning more of their attention and resources to the decisions of regulatory agencies, acknowledging where the real work is being done.

The last player is the bureaucracy itself, represented by many people in this room, by non-attorneys, technical staff, and program office people of all sorts, who manage the regulatory process on a day-to-day basis.

The individual bureaucrat, by some in my field, is seen as a budget-maximizing, perk-seeking individual whose output of work is strongly influenced by these and other personal motives. This perspective and its variations are most often associated with the public choice school.

Others consider the individual bureaucrat as perhaps less self-interested but nonetheless dangerous. These scholars view major delegations of authority to the bureaucracy as grants of major discretionary power as well, and in the exercise of that authority they see the prospect that our bureaucrats will become "patrons" and that the American people will become serfs.9

Still others who have entered the study of this process over the past fifteen years have examined exactly how much discretion the individual bureaucrat, and for that matter the individual bureaucracy, has when it makes very sensitive regulatory decisions. What they find I think is best summed up by Gary Bryner. Bryner said that if we mean by discretion that agencies and officials are free to do what they choose, that they are free to allocate resources and exercise unconstrained power, then clearly there is very, very little discretion in the administrative process.10 I spoke earlier of the formidable pressures that Congress, the President, the courts, and interest groups bring to bear on these regulatory institutions.

Work by Bill West11 and others has been able to establish what all of you in this room know: that different professions represented in the agency take a very different view of how regulations should work. His research has established that members of the office of general counsel, economists, and program managers with technical backgrounds have different perspectives, employ different criteria, and are performing different functions when they make regulatory decisions.12 The image of a monolithic bureaucratic enterprise seeking more and more budget, perks, and discretionary power to manipulate the lives of the American people is offset by an image of agencies divided internally and besieged from the outside.

12. Id. at 1-13.
Overall, what we are left with is a very distressing picture of the contemporary regulatory process. We find a process that scholarship in political science establishes as being subjected to multiple powerful forces exerting ever-increasing pressure on institutions whose limited resources are overtaxed. In addition to limited resources, the decisionmakers in agencies have modest discretionary powers at best.

It seems to me these problems, these forces, are most obvious in the rulemaking processes that are operated by the major agencies of government. Consider for a moment the elements that must come together for a rulemaking to happen. First, three different types of law have to be attended to and complied with: the substantive law that establishes the mission of the agency; the procedural law that dictates how the rulemaking is to be accomplished; and the analytical requirements that are established in the Regulatory Flexibility Act,\textsuperscript{13} the Paperwork Reduction Act,\textsuperscript{14} and the recent Executive order of the President of the United States with regard to economic and benefit-cost analysis.\textsuperscript{15}

Once you have the law in hand, then you must turn to the technical tasks: What has to be done? What must the rule accomplish? How do we accomplish it? What is known? How do we acquire the information we need?

Congress has pushed regulatory agencies to the edges of human knowledge and understanding, and beyond, in many regulatory areas. Regulatory decisionmaking must often overcome incomplete information and great uncertainty.

Increasingly, this requires that the rule writers turn to the contracting community for help. I am sure all of you are fully aware of the special joys of government procurement and contract management.

An integral part of any rulemaking is managing the process of public participation. It requires the selection of the proper mechanism to secure the necessary public input. The minimum requirements are set in law, but these alone may not be adequate to educate the agency in the matter before it. Public participation is both a legal requirement and a mechanism to help the agency solve the problems addressed by the rule. Once the agency has selected the form of participation, how does it evaluate and use the results? The information provided by the public on proposed rules can be extensive and inconsistent. But it cannot be ignored. It must be integrated into the agency’s own technical work.

\textsuperscript{15} Exec. Order No. 12,291, \textit{supra} note 6.
How requirements will be implemented and enforced is a crucial aspect of any rulemaking. Too often we discover that regulations cannot be enforced in the field. And they cannot be enforced in the field because when they were written the agency was not informed properly of the realities of compliance or the needs of enforcement staff. All will agree that writing rules that cannot be implemented is an unconscionable waste of resources. But it is more difficult than it might first appear to incorporate the “case-by-case” perspective of enforcement officials into the general policy perspective adopted by rule writers.

How do you bring all of these elements together to achieve a successful rulemaking? Increasingly, and to the benefit of the regulatory process in general, we are getting some careful thought and good scholarship on how to better manage the complex process of writing rules. As I said, there are certainly no panaceas. But there are sound ideas for reducing delays and waste. These ideas and techniques can also improve the quality of completed regulation.

One particularly exciting device is no longer new: regulatory negotiation. I think everyone would agree that it is an idea that is appealing in the abstract, well established theoretically, and tested in practice by several agencies. Yet, it has been slow to gain acceptance across the government.

But rather than assuming the process has only limited potential, one should acknowledge how long it takes a major, if not a revolutionary, change in the regulatory process to occur. I know this afternoon Phil Harter, Neil Eisner, and Gail Bingham will be talking about some of these processes, so I will not go into that any further.

Let me talk about some new things that are emerging from more traditional forms of rulemaking. Many will appear commonsensical, but their value is nevertheless considerable. One is simply setting priorities for rulemaking projects, acknowledging that when one office in an agency undertakes a rulemaking activity, they are in fact committing resources across the entire organization. A self-conscious approach to the timing of regulation development is important. A priority-setting process has the potential to clarify where and when agencies will invest limited resources.

A second area is leadership in the management of rulemaking from the senior level of agencies. Nothing is clearer from available research than the fact that unless the leadership of an agency—and I mean by this the political leadership of an agency—joins with the career bureaucracy in a concern for the quality and speed of rulemaking, it is very unlikely that major strides in managing this process are going to succeed. The natural forces that induce delay are simply too strong.
Agencies that report some degree of improvement in the development of regulations have made improvements with the assistance of very senior management. These efforts take many forms, including creation of a regulation management unit attached to or supported by the head of the agency that monitors and often assists those writing rules.

In scrutinizing the procedural steps that it takes to get from the start of a rulemaking to publication in the *Federal Register*, one can find astonishing things.

An analyst in the Environmental Protection Agency recently wrote a dissertation at the University of North Carolina on the process of developing a national ambient air quality standard. What he discovered was that a process, which began in the early 1970's, with twelve discernible procedural steps, had reached seventy individual reportable events by the 1980's. Each of these were significant activities that had to be accomplished before the rule could be finished. Where did all these steps come from? How did they become part of the regulatory process?

What he found was twelve of them were attributable to the Clean Air Act and its amendments. Three were required by other statutes. Five were required by Executive orders. Four were required by courts. Forty-six were management "innovations," by the agency itself. These are defensive measures designed to minimize error, be it scientific, technical, or political. What one finds is that agencies are taking a very hard look at the efficacy and necessity of these multiple points that have to be negotiated in the rulemaking process. But in doing so, trade-offs become readily apparent. For example, multiple levels and sequences of internal concurrence, at both the proposed and final stage of a rulemaking are common in most agencies. We all know that once a step in the process is established, it is exceedingly difficult to get rid of it. None of them are irrational taken alone, but taken together they burden the process enormously. Once again, commitment on the part of senior management, at least in this particular agency, has been able to reduce the steps from seventy to fifty-five. It certainly appears to be going in the right direction, but there is a price paid in internal participation and, perhaps, in reaching a consensus.

The establishment of firm schedules for completing rules, but ones that are based on a consensus of those who must come together in order to produce the rule, can be quite useful. Neil Eisner has suggested in a recent article in the *Administrative Law Journal*\(^\text{16}\) that schedules can have a very positive effect on the expeditious completion of the

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rulemaking project, but they would have to be used in a sophisticated way. They become a source of subtle peer and not-so-subtle management pressure on those responsible for the rule. They can be supported by elaborate management information systems, as they are in a couple of agencies, or by simple reports that are sent periodically to senior managers on the project and processing of the rule.

Last, and perhaps most important, is the emergence of team approaches to the writing of regulations. Again these are not new and have evolved gradually over time in response to the growing complexity of statutes requiring multiple forms of expertise and authority.

These team approaches, or workgroups, work best when significant authority is delegated to team members, frequently up to as high as the office director level. With this authority comes responsibility. Team members must communicate effectively with management regarding issues that arise in the rulemaking and how those issues are being resolved. Most important, communication must operate in the other direction as well so that the preferences of senior management are communicated to team leaders and members. When this works, what it tends to reduce is the phenomenon called the “late hit,” when a rule or regulation about to go into draft or final form is stalled by a late-breaking issue. Whether it is an unanticipated technical problem or a dispute over policy, late hits are a common and avoidable source of delay. Team approaches, when properly implemented, can be effective in reducing the frequency of such problems.

The team approach in most agencies has also underscored, at least among the leadership of the agencies, how absolutely vital it is to train those who become involved in the rulemaking process. There is no reason to believe that someone who is technically expert in a particular area, or even an attorney aware of all pertinent legal and organizational requirements, is somehow qualified to manage as complex a project as the creation of a federal regulation. Training in these areas is important, as is guidance on group interaction and the building of consensus.

The management of this process must become more self-conscious and more of a priority. It is not just rulemaking that has to be managed more intelligently and more effectively. It applies as well to the process of implementing regulations once they are written, to complying with them once they become obligations, and to enforcing them.

17. See id. at 33-34 (stating that some tasks are not suitable for rigid schedules).
18. See id. at 43 (suggesting that establishment of rulemaking schedule depends on structure of particular agency).
when voluntary compliance fails. Resolving disputes that arise under the enforcement process is an area where considerable work has already been done by those who are expert in the management of alternative dispute resolution proceedings.

The responsibilities of our regulatory institutions will not diminish soon; the management task will grow. We must be as concerned with innovation in organization and process as we are with fundamental policy. To that end, the School of Public Affairs here at The American University will offer next year for the first time, and we hope on an annual basis, a symposium on the management of regulation. We will focus on rulemaking, implementation, and dispute resolution, and we hope to bring together the best scholars in the country to tell us what the state of the art is in the academic community in terms of thinking about these issues. We want to bring in a broad cross-section of public and private sector individuals who are expert in these processes to discuss their ideas.