Viewpoint

Christopher C. DeMuth

A Strong Beginning on Reform

THE REAGAN ADMINISTRATION'S record on deregulation during its first year in office has not been perfect. Any close reader of *Regulation* magazine will be able to cite shortcomings and missed opportunities. On the other hand, the administration's record has been far better than that of any other administration, even allowing for the fact that it has had more to deregulate than any other. And, as the regulatory economists tell us, it is idle to talk of imperfection except in reference to a well-specified alternative.

Administration officials have done many good, specific things to rid the economy of harmful restraints that were nevertheless much in favor in Washington. Some were easy—unisex dress codes in schools, subway elevators in mid-town Manhattan. Others were harder, especially where health or safety was involved and the administration would be accused of having blood on its hands. The most important of these was the rescission of the automatic seat-belt requirement, which would have added over $100 to the price of every new automobile for devices that are disconnected even by most people who buy them voluntarily.

My own favorite rescission was the quick *coup de grâce* delivered to the petroleum price controls, which was greeted so confidently with charges that prices would skyrocket without much effect on supplies. As a result of this action, retail gasoline and heating oil prices declined in 1981—gasoline even in nominal terms in some areas—and successful new oil drillings hit record levels. Gas lines were replaced by gas price wars, the first outbreak of this venerable American tradition in the experience of drivers under twenty-five. This winter is one of the coldest in memory and the first in years without heating oil shortages—an achievement hardly anyone noticed in the absence of government planners to take the credit.

The administration has also made improvements in policy and program management. The Department of Agriculture's recent guidelines on fruit and vegetable marketing orders are the first serious attempt to reform this program since it was enacted in the waning days of the New Deal. (See "Dispatch from the Nut Wars," page 8.) The Food and Drug Administration approved more wholly new drugs than in any other year since the 1962 Drug Amendments, doubling the number approved in the last year of the Carter administration. In approving a new application for an existing drug, timolol, the FDA reversed two of its sacred precedents in a single stroke—the requirement that proof of efficacy rest on two independent studies and the requirement that one of these studies take place in the United States. At the level of inspection and enforcement, businessmen today are much less likely to mistake a visit from EPA or OSHA for a visit from the FBI.

There have been, inevitably, some disappointments as well, especially in environmental regulation. Officials of the Environmental Protection Agency have been distracted by congressional and budgetary disputes. They have just begun to face scores of hard regulatory decisions that have been overhanging major markets and capital investment projects for years, and whose economic impact is vastly greater than EPA's entire budget. The costs of continued regulatory uncertainty would have been well invested if their result had been a wholly reformulated Clean Air Act. Sadly, the politics

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of environmental control have become so dominated by inter-regional and intra-industry economic interests that the prospects for fundamental improvement remain dim. For the near term we will have to be content with adjustments to the act's most unrealistic provisions.

But above the fray of battles won and lost, the administration's greatest achievement has been President Reagan's Executive Order 12291, requiring that all new regulations be supported by solid evidence demonstrating their economic benefits, and establishing a central review procedure to enforce the requirement. Looking back on the decade of the 1970s—on the growth of regulatory programs, on the dawning realization of the large costs of these programs, and on the nascent efforts to control regulatory costs in the Ford and Carter administrations—one might suppose that President Reagan's order was the easy last step in a natural evolution. But this was not the case. Making economic analysis a line function in the regulatory agencies and the Office of Management and Budget was a qualitative departure from all that had come before, and a decision that was and remains controversial. There is as much worry among conservative as liberal activists about "paralysis by analysis," especially when conservatives are coming to power. In the euphoria of a new administration, it would have been easy to assume that Reagan's regulators would do the right thing by instinct. It was an act of some insight to recognize that the regulatory juggernaut had grown so powerful, and the pressures for it to move forward so intense, that it needed a strong and formal restraint even in a conservative government.

Central oversight of the wide variety of rules laid down in the *Federal Register* is not without its problems. Critics of "cost-benefit analysis" are fond of describing it as a narrow, easily manipulated technique. This is nearly the opposite of the truth. The greatest practical difficulties in applying economic reasoning to political decisions arise from its qualities of breadth, rigor, and disinterestedness. Under relaxed economic assumptions, one needs no cost-benefit calculations at all to decide whether society will benefit from mandatory uniform quality standards for products such as automobile bumpers and fresh fruits that are easily judged by consumers; nor does the economist pause for long over most proposals to establish uniform prices or restrictions on entry or output. Yet these are the everyday stuff of regulatory policy, where the issues are so discrete and are pressed with such unabashed parochialism that the free marketeer—arguing from the inside rather than observing from the outside—is always prone to appear a little impractical, if not ridiculous. Thomas C. Schelling of Harvard University observes that we do not expect people to argue about leash laws the way they argue about the space shuttle; dog lovers are expected to oppose leash laws without appeal to any interest broader than their own. Economic analysis of regulatory issues, as embodied in President Reagan's executive order on regulation, is an attempt to get people to consider leash laws disinterestedly—and this in a town where people are used to debating the space shuttle the way New Yorkers debate leash laws.

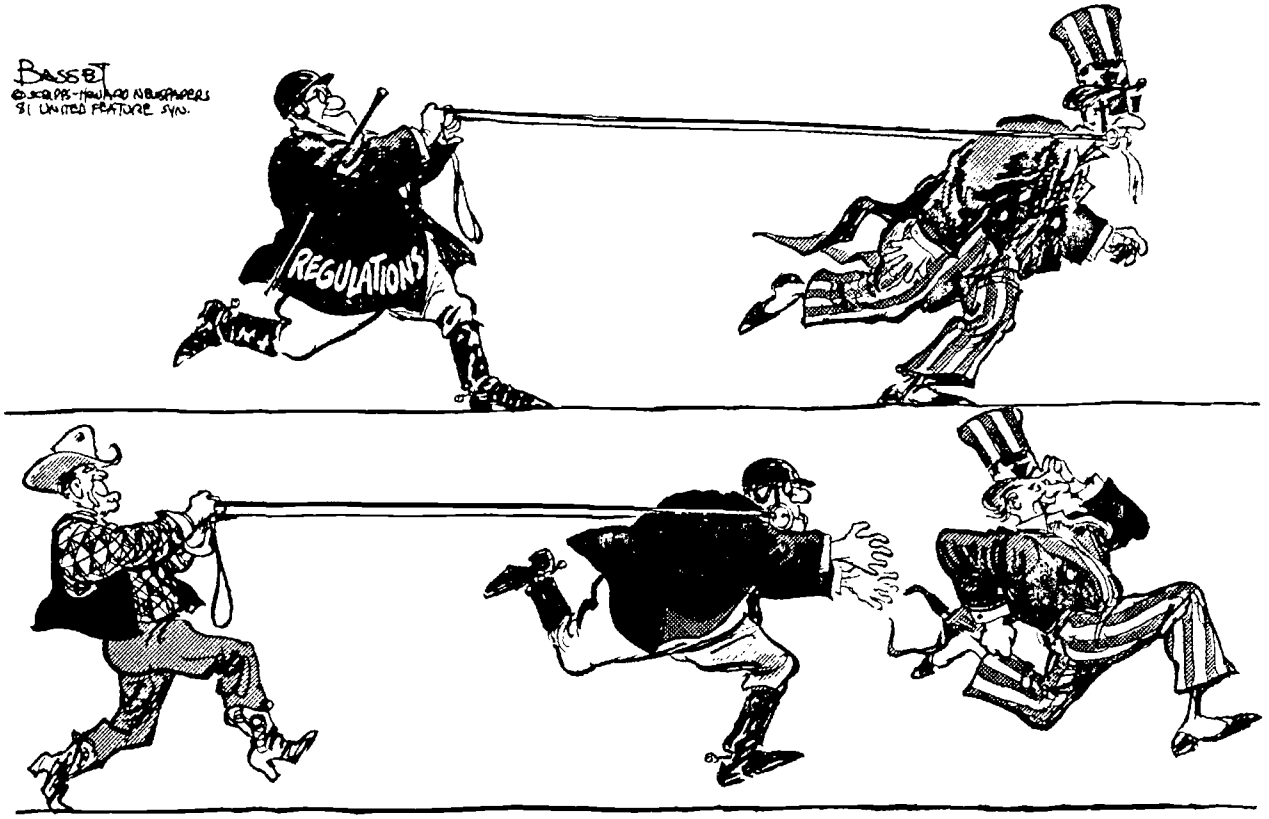
A separate problem is that imposing controls from within is politically thankless. It is very difficult for an administration to get much credit for failing to issue unwise regulations; that it came close to issuing them anyway is hardly something to beat its chest over. Everyone understands that the Office of Management and Budget favors lower agency budgets than the agencies themselves. It is a different matter when OMB disagrees with an agency's regulatory proposal: assuming OMB's view prevails, the administration has no good deed to advertise and OMB must enjoy its good deed in silence. I believe the executive order review process has substantially deterred the publication of ill-considered new regulations, and for the present I can point to statistics showing dramatically fewer new regulations in President Reagan's first year than President Carter's last year. But as the administration grows older the Carter record will lose its relevance, and there will be no other points of reference to demonstrate the benefits of the review process.

Here again, however, one must judge the executive review procedure against the alternatives—and these, aside from a vast contraction in the regulatory statutes themselves, are constitutionally limited to two. The Congress is presently considering a variety of procedural reforms to restrain the regulatory process, and everyone can be categorized as either an executive, judicial, or congressional restraint. Congressional restraint through one form or

another of "legislative veto" has recently been dealt a blow—I predict mortal—by Judge Wilkey's masterful opinion in *Consumer Energy Council* v. *Federal Energy Regulatory Commission.* But legislative vetoes are ineffective even if they are unconstitutional. There are already hundreds on the books and they are almost never exercised outside of the fields of foreign aid and arms sales. Given the enormous costs of organizing legislative majorities, vetoes of regulations championed by the executive branch can be expected only in the rarest of circumstances. Even the threat of such vetoes cannot provide a restraint comparable to routinized executive oversight.

Greater judicial restraint, in the form of the various "Bumpers amendment" proposals for stricter judicial review of regulatory decisions, is equally problematic. One can imagine a good judge straightening out a bad regulatory decision, but one can also imagine a bad judge spoiling a good regulatory decision. There are, of course, good reasons for expecting judges to be freer of narrow political pressures than regulators, but the price they pay for their insular position is to be limited to issues of statutory consistency in the controversies brought before them. So long as the statutes themselves leave great discretion to the regulators, and so long as we are unwilling to permit judges to be policy makers outright, the role of the courts will remain limited under *any* standard of judicial review.

There is a practical solution to this dilemma, and it leads us back to the policies articulated in President Reagan's executive order. Few of us, including Senator Dale Bumpers himself, are willing to abide more explicit policy making by courts than already exists. This leaves the alternative of narrowing the statutory discretion of regulators, which can be accomplished either by statute-by-statute revisions or by a general requirement that discretion be exercised according to an overriding criterion. But the statute-by-statute approach is much less promising than the general approach, and the general approach is most compelling when its overriding criterion is that of economic efficiency (or cost-benefit analysis). Where specific issues are involved, such as worker safety or carcinogenic food additives, legislators are less likely to acknowledge the two-sidedness of problems and more likely to insist on absolute-sounding legal standards; the



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current posturing over the Clean Air Act revisions is a good case in point. When policy is set at a more general level, however, legislators are more likely to acknowledge the common sense of requiring regulations to take due account of costs as well as benefits. This is why proposals to revise the Delaney amendment along economic lines are currently bogged down, while the regulatory reform bills, which would require that all new regulations be economically justified, stand a good chance of passage.

The cost-benefit criterion strengthens judicial oversight more surely than any of the Bumpers proposals because it obliges regulatory agencies to include in the record evidence of the economic consequences of their decisions—evidence they must take some account of even under lenient standards of judicial review. We have already seen this effect in the Supreme Court's recent decisions in the *Benzene* and *Cotton Dust* cases. But the criterion is even more powerful as an instrument of executive oversight. The presidency, of all the offices in our system of government, is the one most suited to advancing a consistent program against narrow political pressures. Whatever the political philosophy of a given President, he is far more likely than Congress or the courts to take a broad view of the economic interest of the society, and far more able to impress this view on the federal bureaucracy. The economic principles set forth so unequivocally in President Reagan's executive order are a product of his own strong mind on federal regulation. I expect that, in spite of the difficulties mentioned earlier, the application of these principles will result in more carefully reasoned and empirically solid regulatory decisions, which will narrow the opposition to these decisions in Congress and the courts and strengthen the President's command over the course of regulatory policy. If so, the principles will endure—in statute, judicial doctrine, or executive conduct—as a lasting achievement of his administration.

With the economic assessment program in place, the administration is in a good position to press its regulatory reform efforts on two additional fronts. The first is revising the mass of uneconomic regulations already on the books. The Presidential Task Force on Regulatory Relief, chaired by Vice-President Bush, has already designated for reconsideration 111 existing regulations spanning the entire range of federal policies. Several important decisions have already been made (such as the automatic seat-belt rescission) but many more remain; we currently expect that about half of that entire group will be completed by mid-1982 and most will be completed by the end of the year. In this area, more than in the internal control of new regulatory proposals, the administration will be able to point to specific "relief" from its efforts. Revision of existing regulations will also provide market evidence of the economic effects of the administration's regulatory policies—such as the past year's evidence on petroleum decontrol—which should serve to mollify some who are currently skeptical of our intentions.

The second and more ambitious step is broad statutory reform. The administration has been criticized for not mounting a full-court press for statutory change already—a shallow criticism, considering that the cost of such an effort would have been reduced chances of victory on our initial tax and budget proposals. In any event, the history of deregulation is that major administrative reform is a necessary prerequisite to statutory reform. Before Congress itself will act, external changes are required to dislodge accumulated interests in the status quo and to assure the doubtful of the economy's ability to continue functioning in the absence of federal controls. How far one can go unilaterally is as much a question of politics and timing as of statutory language: while I have expressed some skepticism about the possibilities for fundamental improvement in the regulatory statutes, it should be obvious that the administration cannot continue indefinitely making hard choices, especially on matters of health and safety, without the active collaboration of the Congress. If we are to achieve major statutory reform in the last two years of President Reagan's first term, we must first build a solid foundation of administrative deregulation in 1982. ■

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