Perspectives
on current developments

Government Regulation of Government: the USPS, the PRC, and the FCC

The Governors of the United States Postal Service met on June 3 and again failed to take action on the pending recommendation of the Postal Rate Commission concerning the Postal Service's commencement of electronic mail service. The matter has a long and tortuous history, which is worth pursuing for the light it sheds upon the regulatory process in general and the functioning of the 1970 Postal Reorganization Act in particular.

The U.S. Postal Service has been slow to enter the telecommunications field. Until recently, its only direct involvement was the delivery of Mailgrams, a service marketed and controlled by Western Union. This began to change under Postmaster General William Bolger, who took office in March 1978. Bolger favored an electronic role for the USPS to offset expected declines in conventional mail volume, and moved forward with three new service proposals—Intelpost, EMSS, and E-COM. The first two are *facsimile* systems designed to transmit anything that appears on a piece of paper. Intelpost, envisioned as an international service relying on satellite circuits, is currently bogged down by the Federal Communications Commission's rejection of tariff filings from RCA Global Communications and TRT Telecommunications. EMSS, a futuristic domestic service still in the planning stage, would equip selected post offices across the country with electronic devices to transmit and receive images, using satellite circuits for interconnection.

Unlike EMSS and Intelpost, E-COM is a plain old *alphanumeric* service, limited to the transmission of messages that can be typed on a standard keyboard. It is intended to provide the high-volume mail user with speedy, low-cost delivery of computer-generated messages—principally dunning notices and other standard high-priority messages.

E-COM is a so-called Generation II electronic message service, meaning that both the input and the long-distance transmission are electronic, but the output is hard copy ready for hand delivery by the Postal Service. Generation I services involve hand delivery both to and from the post office, with electronics providing only the long-distance transmission. Generation III is electronic from sender to receiver.

According to senior USPS officials, the Postal Service wishes to enter the markets for Generation I and II services in order to take advantage of its existing nationwide delivery network, and has no interest in Generation III. However, the communications industry fears that USPS will initially cross-subsidize Generation I and II service so as to establish a foothold in the electronic market; and they fear that it will then use its existing electronic capability as a plausible reason to expand into Generation III—which, they predict, will soon consign Generation II to the realm of the Pony Express. It is the case that the $1.7 billion communications system on the drawing board for EMSS, which USPS officials describe as strictly Generation II, could provide Generation-III service with almost no modification.

Against this background, it is clear why the E-COM proposal was seen from the beginning as a precedent-setter. Its outcome would shape the Postal Service's relationship with both the communications industry and the PRC. It would also broadly determine the respective spheres of jurisdiction of the PRC and the FCC regarding electronic mail.

So much for the commercial and technological background. Now for the regulatory structure within which the E-COM case will be resolved: The Postal Reorganization Act made the U.S. Postal Service an independent establishment of the executive branch, headed by an eleven-member Board of Governors com-

posed of nine governors (appointed by the President), the postmaster general (appointed by the Governors), and the deputy postmaster general. The act also established the Postal Rate Commission as an independent agency with a unique regulatory relationship to its sole subject industry. Before any changes in postal rates or mail classifications can take effect, the Postal Service must submit its plan to the PRC for that agency's "recommended decision" in accordance with rather vague criteria specified in the statutes—for example, "the establishment and maintenance of a fair and equitable classification system for all mail." (A complication that need not be pursued here is that the commission may also issue a recommendation upon its own initiative, unprompted by any proposal from the USPS.) The recommended decision is to be issued after a record hearing has been accorded "to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public." And the recommended decision is addressed to —of all people—the nine governors of the Postal Service itself. They may reject the recommendation—in which event the matter ends there, and the rate or classification revision desired by the Postal Service does not take effect. The Governors may, on the other hand, approve the decision, in which case aggrieved parties may appeal to the courts; or they may allow the decision "under protest," in which case aggrieved parties and the Governors themselves may appeal to the courts. Finally, the Governors may reject the decision but cause the Postal Service to resubmit its request—in effect remanding the matter to the PRC for reconsideration. In the latter event the PRC must, after reconsideration, issue a "further recommended decision," which again is submitted to the Governors. This time, however, the Governors have an additional option: if they are unanimous on the matter and if they find (among other things) that the PRC's further recommended decision does not provide rates adequate to balance the books, they may *modify* the commission's decision and implement their own proposal—which will, again, be subject to judicial review at the instance of aggrieved parties.

It should be apparent that this strange balance-of-power arrangement between the PRC and the federal establishment it is supposed to regulate contains the seeds of bitter bureaucratic fruit; and the E-COM case appears to be the first large harvest. The sequence of events has been as follows: The Postal Service submitted its E-COM proposal to the commission in September 1978, about six months after Bolger took over as postmaster general. Under that proposal, Western Union was to procure and operate the data-processing and telecommunications equipment, and USPS was to handle only printing, enveloping, and final delivery. Since Western Union was willing to support the service for a trial period on its in-place Mailgram equipment, regulatory approval was all that was required to go forward.

To the surprise of USPS management, the PRC decided to give the proposal a hard look, following objections from the Department of Justice, the National Telecommunications and Information Administration, and the Officer of the Commission (referred to above). Hearings were quickly begun, focusing on charges that the system design and the use of a sole-source contractor would have anticompetitive effects on the market for communications services.

At about the same time, another regulatory complication emerged. Two challenges to the E-COM proposal had been filed with the FCC—which has, of course, as much apparent jurisdiction over electronic telecommunications as the PRC has over the mail. The commission, responding to Graphnet's request, ruled in August 1979 that E-COM constituted a communications service and therefore was concurrently subject to FCC regulation. And the FCC's Common Carrier Bureau examined, and rejected as discriminatory on its face, the tariff application it had required Western Union to file.

With the Postal Service in trouble on two regulatory fronts, the White House took action. In late 1978, an eleven-agency task force was formed under the direction of Domestic Policy Adviser Stuart Eizenstat. That effort culminated in mid-July 1979 with the President's supporting Postal Service involvement in electronic mail, but attaching eight restrictions deemed necessary to ensure free and open competition in telecommunications. While Postmaster General Bolger publicly concurred with the President's position, the Postal Service argued before the PRC that the eight conditions were not applicable to E-COM—and took the

In Brief–

Soviet Ammonia—Act II, Scene I. In our January/February issue we described the International Trade Commission's decision curtailing imports of Soviet ammonia—which was overturned by a free trade presidential decision—which was in turn soon followed by a presidential change of heart attributable to Afghanistan. The outcome at that time was a White House request for a further ITC investigation, enabling the President to impose a temporary import quota. We noted that it would be ironic if the ITC were to change its mind—deciding for free trade now that the White House clearly wanted to keep the stuff out.

That is exactly what happened. On April 11, the new member of the five-member commission sided with the two dissenters from the earlier decision, voting to let Soviet ammonia in. The next scene in this farce should see the President reversing *his* original decision, again overturning the ITC—this time for coming out the way he told it to come out the first time. But, alas, negative ITC decisions are not reviewable by the President. Still, a final scene may yet be written, for the House is considering a bill to raise the ammonia tariff for Communist nations.

FEC Gets Trimmed. On February 5, the U.S. Court of Appeals for the Second Circuit dismissed the Federal Election Commission's suit against the Central Long Island Tax Reform Immediately Committee (CLITRIM). In 1976, CLITRIM had spent $135 to publish a newsletter in which it listed the votes of the local member of Congress on twenty-four issues, and described the votes as being for either "higher taxes and more government" or "lower taxes and less government." The newsletter never mentioned that the congressman was up for reelection, never identified his political affiliation, and never referred to his opponent. Despite this, the FEC ruled that CLITRIM had been "expressly advocating the election or defeat of a clearly identified candidate" within the meaning of the Federal Election Campaign Act Amendments of 1976, and thus the reporting and disclosure requirements of the law applied.

A unanimous court of appeals judged the FEC's position "totally meritless." The law as written in 1974 had required organizations to report expenditures of more than $100 "for the purpose of . . . influencing" an election, but that language was changed in 1976 after the Supreme Court found, in *Buckley* v. *Valeo*, that the reporting requirement must be limited to expenditures for the express advocacy of a candidate's election or defeat if it was to avoid being unconstitutionally vague. "Contrary to the position of the FEC," the appeals court said, "the [new] words 'expressly advocating' mean exactly what they say."

Chief Judge Kaufman, joined by Judge Oakes, filed a concurring opinion of even broader sweep—suggesting that *Buckley* did not go far enough in striking down aspects of the Federal Election Campaign Act that infringe on First Amendment guarantees: "It is incongruous to compel defendants to convince a court that they have not dared to 'expressly advocate' the defeat of a candidate for public office. I had always believed that such advocacy was to be applauded in a representative democracy. . . . [C]ampaign 'reform' legislation of the sort before us is of doubtful constitutionality. . . .

Goals + Sanctions = Quotas. For those who are in any confusion about the difference in coercive effect between lawful affirmative-action goals and unlawful affirmative-action quotas, the Justice Department's notion should be apparent from Attorney General Benjamin R. Civiletti's April 9 address at Howard University:

"When I became Attorney General, in August of 1979, a survey of the top positions in the Department of Justice showed 14 women, 16 Hispanics, 41 blacks, 3 native Americans, and one Asian American in those positions. I have made it clear since I took the job that I intend to double those figures before I leave, given some reasonable time. To accomplish that, I have taken a number of specific steps. I have instructed each component of the Department to develop by May 15, goals and time tables for increasing the number of minority, women and handicapped employees in each category of employee within the component.

"Senior Executives Service members . . . will be evaluated on their success in meeting their component's goals, and continued employment, promotion and raises depend on these evaluations."

Presumably the matter has been made just as clear to all employees, and prospective employees, of the Department of Justice.

FCC's assertion of jurisdiction to court.

Meanwhile, back at the PRC hearings, the Officer of the Commission (OOC) was urging an "alternative design" for E-COM, one that would permit competition in the communications segment of the service. Whereas the Postal Service proposal required that all data and message processing be performed at the Western Union facility in Middletown, Virginia, the OOC design would give the Postal Service the capability to receive messages from multiple communications common carriers at each electronically equipped post office, enabling mail users to send their messages directly to the Postal Service.

Aside from the savings and wider variety of service offerings likely to be realized as a result of competition in the communications segment, the OOC's equipment configuration would be considerably less costly than that pro-

posed by the Postal Service. This would be partly the result of using state-of-the-art technology instead of Western Union's vintage computers. But considerable economies would also result from decentralized processing: the USPS proposal required two transmissions of each message—first from customer to Western Union and then from Western Union to an electronically equipped post office—while the OOC design required only one—from customer directly to the post office.

In December 1979 the PRC issued its recommended decision, rejecting the Postal Service's proposal and adopting the OOC's pro-competitive version of E-COM. The commission took note of the FCC's policy of encouraging competition in the market for communications services, and found that several carriers had an existing or potential capability to provide the communications support. It therefore required the Postal Service to encourage interconnection by all communications common carriers.

Perhaps even more important, the PRC's decision cut the Gordian knot that had bound E-COM for eighteen months. By separating the electronic function of transmitting messages from the functions of converting messages to hard copy and physically delivering them, the PRC permitted a rational division of regulatory jurisdiction between the FCC and itself and allowed competition in the electronic segment while not disturbing the Postal Service's statutory monopoly over first-class mail delivery. (The same separation, of course, renders the USPS's entry into Generation III less likely.) In addition, the PRC found that the Postal Service's specifications had arbitrarily limited consideration of competitive alternatives and that its evaluation of carriers other than Western Union had been "pro forma."

The commission's decision received widespread support. However, on February 22 of this year the Governors of the Postal Service rejected it and sent it back to the PRC for reconsideration. They accepted the "basic structure" of the commission's decision, agreeing there should be "full and free competition in the telecommunication's segment of E-COM"; but they requested revision or clarification of five points —none of which (the PRC pointedly observed) would have prevented E-COM from being implemented immediately. On April 8, the PRC issued its further recommended decision, making the one clarification the Governors had requested. This was by no means insignificant, since it acknowledged that the Postal Service could, as far as the PRC was concerned, contract for its own telecommunications link in conjunction with private carriers—though the PRC noted that FCC approval might be needed for this purpose. (The Postal Service is currently contesting in the courts the FCC's asserted jurisdiction over the service's telecommunications activities.) But the PRC declined to make two of the revisions that the Governors had requested and left the other two for determination after further hearings.

The two requested revisions that were declined convey some of the flavor of the institutional turf-protection that is going on here. The Governors had requested, and the PRC declined to provide, authorization for the Postal Service to require "assurances of service quality, duration and scope" from carriers providing service to electronically equipped post offices. Anyone familiar with regulation—and with telecommunications regulation, in particular—should be aware that the power to establish quality standards amounts to the power to restrict competition. The PRC's refusal to provide this authority to the Postal Service was based principally upon the ground that it belonged to the FCC. The other declined revision was a request by the Governors that the PRC eliminate the description of its approval for E-COM as being on an "experimental" basis and, more specifically, eliminate the approval termination date of October 1, 1983. This device, of course, gives the PRC substantial continuing power over the field. Without it, the PRC could, on its own initiative, make recommendations for revision in the structure of E-COM—but unless the Governors approved those recommendations, the status quo would continue. With the approval cutoff date, however, it is the PRC that has the leverage: unless the Governors accept its 1983 decision, E-COM will come to a halt.

As noted at the outset of this discussion, the Governors—although long anxious to initiate an electronic mail service—have still failed to act upon the PRC's April 8 further recommended decision, despite the fact that they have accepted the PRC's basic pro-competitive approach. Some expect the Governors to give their approval after a delay long enough to call attention to their veto power and display

their pique. That is probably an accurate prediction, but institutional incentives render it somewhat less than certain. The PRC's seizure of the lead role in this matter has come as a surprise to most observers, and a shock to the Postal Service. An agency whose only explicit dispositive authority is to prevent mail rate and classification changes and post office closings has ended up drawing the jurisdictional demarcation between postal regulation and telecommunications regulation, assessing the relative advantages of open competition, and evaluating the technological and commercial feasibility of such electronic esoterica as multiplexing and archiving.

The PRC has, in short, effectively prescribed the nature and extent of Postal Service entry into this new field. That the commission should turn out to have so much power should come as no surprise to private companies in the regulated sector, who know the regulatory corollary to the ancient maxim: he who approves the piper's rates and classifications calls the tune. And private regulated companies must take a certain perverse delight in the spectacle of a government enterprise's learning this lesson firsthand—and getting caught, to boot, in a classic regulatory cross fire from the PRC and the FCC.

In short, the PRC has done no more than engage in normal and quite predictable regulatory behavior. But that is small comfort to the Postal Service, which is, after all, a government agency with the supposed immunity from management-by-regulation which that entails. From the Postal Service's point of view, establishing the level of PRC intervention that it is willing to tolerate may be more important than prompt commencement of electronic mail service. Indeed, it may even be more important than ultimate commencement of electronic mail service if the terms of such commencement are to be so limited (as they now are) as to prevent the Postal Service's participation in monopoly profits for the telecommunications segment.

It should be recalled that, upon receipt of a further recommended decision, the Governors have the option not merely of rejection but also of revision. One suspects that their long delay may be attributable to the attempt to compile the unanimous vote necessary for such purpose—and (what is perhaps more difficult, if not honestly impossible) the attempt to devise a justification for revision that is based, as by law it must be, upon inadequacy of revenues derivable from the PRC proposal.

Given appropriate odds, it would not be foolish to bet against E-COM. Fortunately, perhaps, the public's stake in all of this may be less than it seems. A private firm, Tymnet, Inc., has just announced plans to offer a service similar to E-COM. The plan envisions that, after messages are transmitted electronically, printed and enveloped, they will be dropped at the local post office for delivery as first-class mail. Under that system, the Postal Service's function will be clearly limited to sorting and hand delivery. That may be where it will end.

Two Lies Are Better Than One

Ralph Nader and Public Citizen (an organization formed under his auspices) have recently been urging that corporations be required to file with the Securities and Exchange Commission any corporate statement made to agencies or courts claiming substantial detrimental effects from proposed or implemented regulations—that is, costs exceeding 2 percent of the corporation's average income or loss for the last three years. The alleged practice to which the proposed requirement is addressed is the "crosstown hypocrisy" of forecasting dire effects from new regulations before the agencies and the courts, while understating or disregarding such effects in reports to the SEC and shareholders. "Someone," says Nader, "is being lied to."

On its face, the proposal seems reasonable enough. Surely, Truth is One, and corporations should not be permitted to dissect it this way. Of course the proposal is not primarily designed to protect shareholders. Any inconsistency between SEC filings and other corporate statements already risks legal liability; and if it were just a matter of bringing such inconsistencies to the attention of unalert class-action lawyers, there would be little reason to focus exclusively upon court and agency rulemaking filings: *all* corporate statements concerning future prospects should be sent to shareholders and the SEC. Obviously, then, Mr. Nader's main purpose is to protect the courts and the agencies from "crosstown hypocrisy," an objective

that is no less laudable simply because it is less expansive. Specifically, it is thought that Cassandra-like warnings of impending doom will be less frequent in rulemaking proceedings (and in court cases reviewing rulemaking) if corporations know that their pessimism must be shared with investors. Thereby, it is thought, accuracy of argumentation and (*pari passu*) accuracy of determination will be fostered.

The proposal merits serious consideration, because if it is sound it should have useful application in many other fields. To take only one of many possible examples: plaintiffs in tort suits might be required to present their courtroom descriptions of their disabling injuries to all prospective employers. But alas, in this context the fallacy of the proposal becomes evident. The fundamental premise of the adversary system, which governs our judicial and rulemaking proceedings, is that the truth can best be determined by hearing both sides of the case *put in their most favorable light* by zealous spokesmen for each. Lawyers spend years acquiring the skill of putting the best possible face upon their clients' case. To accuse a litigating lawyer of making a balanced, objective, even-handed, impartial presentation is high condemnation, if not actionable libel. This same adversarial premise, needless to say, does not govern SEC filings, which are supposed to represent objective assessment rather than partisan argument. Thus, to perceive a difference in the two sorts of filings is not necessarily to perceive hypocrisy—or at least no more hypocrisy than the adversarial system itself entails. And to demand that the two sorts of filings be essentially the same is to distort the one or the other.

Perhaps the post-Watergate morality has elevated us to the point where we can no longer tolerate the sophism of the adversary system. Moreover, morality aside, perhaps the adversary system really does not work. It has been described, after all, as resting upon the misconception that one obtains a clear picture by making a double-exposed photograph, with the camera focused first too short and then too long. The criticism may well have some validity, but it is hardly eliminated by bringing only one of the two exposures into focus—which would be the effect of what Mr. Nader would impose. Corporations would have to be precise and objective in their rulemaking filings; but noncorporate parties would remain free to stretch a point. That the tendency to do so is characteristic of all advocates, and not merely of corporations, is demonstrated, curiously enough, by the rulemaking filing of one of Mr. Nader's own organizations, concerning the very proposal at issue here. The most horrendous example of "crosstown hypocrisy" set forth in that filing was a company representation to the Supreme Court that a benzene standard proposed by the Occupational Safety and Health Administration "would bring the tire manufacturing industry to a standstill," contrasted with an SEC filing by the same company advising shareholders that the standard would have "no material adverse effect." It turns out, however, that the SEC filing related to a later, revised standard—one that had been relaxed precisely to facilitate industry compliance.

Unless the Nader proposal is changed to include some appropriate remedy for such noncorporate hyperbole, it represents not a radical abandonment of the adversary system but, to the contrary, one of the classic gambits in the book of adversary strategy, to be found under the heading "handicapping one's opponent."

Reforming Trucking Regulation

Deregulation it is not—but significant regulatory reform is coming to interstate trucking this year. "The Motor Carrier Act of 1980" (H.R. 6418) was reported to the House on June 3 after being substantially revised in the Public Works and Transportation Committee to reflect a "delicate compromise" involving the trucking industry, the Teamsters, consumer groups, key senators, and the White House. The bill that emerged from committee resembles, in most substantive respects, the pro-reform bill passed by the Senate on April 15. But it placates the trucking interests by including certain restraints on the pace of reform. Truckers were especially pleased with the bills' postponement of deregulatory steps already planned by the Interstate Commerce Commission and with the bill's admonition that the ICC "should be given explicit direction for regulation of the motor carrier industry and well defined parameters within which it may act

pursuant to congressional policy." The trucking interests had fought deregulation for years but, as it gained momentum, they came to prefer the certainty of legislation to the uncertainty of having to deal with an increasingly free-market ICC.

H.R. 6418 deals with the factors on which increased competition and efficiency in the motor-carrier industry depend: easing entry, reducing operating restrictions, allowing some ratemaking freedom, limiting the antitrust immunity accorded to collective ratemaking, and increasing the portion of the traffic that is exempt from ICC regulation.

On entry. Upon enactment, H.R. 6418 will make it easier for common-carrier truckers to obtain new operating authority by effectively shifting the burden of proof from the applicant to those who oppose the application. It does this by providing that the commission, in order to deny a certificate, will have to find the applying carrier's entry "inconsistent with" (rather than "required by") the present or future public convenience and necessity. The applicant will merely have to show that it is "fit, willing and able" to provide the service and that the service will "serve a useful public purpose." The protestant, on the other hand, even to have the right to complain must show that it already has authority to handle all or part of the traffic in question, is willing and able to provide the service the shipper needs, and has performed the service within the last year; or that it had filed an application for substantially the same traffic prior to the applicant. These relaxed entry provisions apply to both contract and common carriers. The bill also allows the commission to award common-carrier operating rights to contract carriers when appropriate.

On operating restrictions. Some observers see the largely unheralded provisions for dismantling many unsupportable restrictions on trucker operations as likely to have the greatest immediate impact on the efficiency of the industry. H.R. 6418 requires the elimination of all gateway restrictions and circuitous route limitations within 180 days of its enactment. The bill also provides that the commission must adopt regulations to broaden the categories of property a carrier may transport, to allow intermediate stops and round trips, and to eliminate "unreasonable or excessively narrow territorial limitations" and any other rule that the commission finds "wasteful of fuel, inefficient or contrary to the public interest."

On ratemaking freedom. Trucking companies will be allowed to set rates without interference within a zone of freedom ranging from 10 percent below the rate in effect one year prior to the enactment of the legislation to 10 percent above that rate. Because the upper limit is keyed to the producers' price index and the lower limit remains fixed, the zone will expand in inflationary periods. In addition, upon making certain findings, the ICC can increase the size of the zone by as many as five percentage points. Rates that are within the zone will not be subject to investigation, suspension, or revocation by the ICC on the grounds that they are unreasonably high or low; but such rates will be subject to the antitrust laws.

On collective ratemaking. The House bill prohibits the written agreements under which private motor-carrier rate bureaus operate from providing for discussion or voting on single-line rates after January 1, 1984. Single-line rates—which are the rates that a single trucker is allowed to charge on a specific route by the rate bureau to which it and other truckers in the region belong—have been a key factor in the truckers' ability to fix prices. The withdrawal of the antitrust immunity from this activity will force truckers to set prices on a more competitive basis. The bill also (1) requires rate bureaus to act on applications for a rate change within 120 days, (2) prohibits interference with each carrier's right of independent action, (3) limits the role of rate bureau staff (as distinguished from member carriers), and (4) requires that "any person" may attend meetings and learn of the votes cast by individual carriers. Finally, reflecting an element of the "delicate compromise," the bill establishes a Motor Carrier Ratemaking Study Commission to study the ratemaking process and the need for antitrust immunity, with a mandate to report to the President and Congress by January 1, 1983. But even if the study commission concludes that the public interest would not be served by withdrawing antitrust immunity from single-line ratemaking, new legislation would be required to prevent that immunity from expiring as scheduled.

On exemptions. H.R. 6418 exempts from regulation two additional commodity groups, animal feeds and nonhazardous agricultural

chemicals and fertilizers, as well as private carriage among 100-percent-owned corporate subsidiaries. It does not, however, include the controversial processed foods exemption that was contained in the Senate bill. (That exemption was strongly opposed by shippers in the food and food products industry—who find the rate bureaus' schedules of rates more predictable than an open market and are, in any event, able to pass transportation costs along to the consumer.) In the opinion of some procompetition observers, the absence of this exemption will be substantially offset by the fact that relaxed entry will allow truckers to handle the processed foods traffic almost as if it were exempt.

The compromise bill has been hailed as a milestone in deregulation. That is perhaps the least apt analogy. Milestones are seldom erected by compromise agreements among competing interests who disagree fundamentally about where the road comes from and where it is going. The ultimate effect of H.R. 6418 will depend to a considerable degree on the ICC's continuing disposition toward increased competition for the trucking industry. And the bill, by explicitly confining the ICC to a congressionally prescribed agenda, in fact limits in some respects the scope within which such disposition can be indulged. Nevertheless, it is an historic step: if not deregulation, it is at least important regulatory reform.

Congressional Control

On May 28, President Carter signed into law the Federal Trade Commission Improvements Act of 1980. From the White House point of view, the most significant feature of the twenty-six-page legislation was the nine lines authorizing the appropriation needed for the FTC to continue (or, more accurately, to resume) its functioning. And perhaps the major quid for that quo was the imposition of a two-house legislative veto upon all FTC rulemaking. Although Carter had threatened to veto all congressional veto proposals, he—like earlier presidents—was unable to maintain that resolve in a high-stakes game of legislative chicken.

The President's signing statement expressed the view that the legislative veto feature was "unwise and unconstitutional" and declared, "I look forward to . . . a court challenge." The latter form of expression may seem oddly passive, as though the White House has no control over whether or when to challenge such an impairment of the President's role in the legislative process. But that may in fact be the case. The FTC, being an independent regulatory agency, is part of the "headless fourth branch"; and it will be incumbent upon not the elected President but the appointed FTC commissioners to make the bold decision to disregard the veto process or (even worse) to ignore a congressional veto—one or the other of which politically difficult (and, in the case of the FTC, perhaps suicidal) steps seems necessary if the government is to place the veto in a litigable posture.

The executive branch is proceeding, however, to place the legislative veto at issue in a context that is within its control—and that involves an agency less likely than the FTC to provoke massive congressional retaliation. On June 6, Shirley Hufstedler, secretary of the new Department of Education, announced in a memo to her senior staff that she would act upon the Justice Department's advice and ignore the Congress's veto of four of her department's regulations. Such action is almost certain to provoke challenge to the regulations by affected parties, and in opposing that challenge, the executive branch may get its day in court on the legislative veto question.

Meanwhile, a new solution for the problem of congressional control has been proposed—one that is both clearly constitutional and more effective than the legislative veto. The House Rules Committee's Subcommittee on Rules of the House recently considered the legislative veto device in connection with pending regulatory reform legislation. In March 1980, on the basis of extensive hearings, Chairman John J. Moakley (Democrat, Massachusetts) forwarded to the full committee a report and recommendation, which concluded: "Enactment of a generic legislative veto may be politically expedient but it would solve only a small portion of our regulatory problems while allowing the underlying deterioration of the regulatory system to continue." The report (March 1980) acknowledges that a central part of the problem is that Congress has granted regulatory agencies "broad and far-reaching authority with virtually no guidance" for implementing it. "Congress must," it asserts, "look to itself to

provide the institutional mechanism for identifying the balancing conflicts and duplications among national regulatory policies, programs and rules." The report finds the currently proposed versions of generic legislative veto inadequate for this purpose because they rely upon the current committee structure.

> . . . Congress, in its present structure, cannot possibly assess the cumulative impact of the various regulatory policies enacted into law. Committee jurisdiction does not permit such a perspective. . . . The legislative veto, as an added oversight tool used within the existing structure, would be subject to the same institutional weaknesses which now preclude the overall consideration of broad areas of regulatory policy.
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> The legislative veto, added to the arsenal presently available to the various subcommittees in the House, might also strengthen the "iron triangle" or "subsystem politics" which exist among the legislative subcommittees, regulatory agencies, and the regulated industries. . . . As a result, it is very likely that Congress will compound its present inability to develop a coherent regulatory policy.

Cong. Moakley's proposed solution is a Select Committee on Regulatory Affairs, with jurisdiction over all federal rulemaking activities. The select committee would be required to investigate an agency rule at the request of any standing committee, and it would be permitted to do so on its own initiative or at the request of any member of the House. Following an investigation, the committee's report on a proposed or promulgated rule could be placed before the full House, and the "moral effect" of the report's adoption would be relied upon to induce the agency to make the suggested changes. Beyond that, the select committee could report out a resolution of disapproval which, if adopted by both houses of Congress (and submitted to the President for his approval or veto), would nullify the rule. In addition—and perhaps most important of all—the Speaker of the House would be empowered to refer to the select committee legislation that authorizes rulemaking, for a report on "(1) the adequacy of the guidance provided to the agency . . . and (2) the appropriateness of such delegation of legislative authority. . . ."

The Moakley report, which takes the form of a committee print prepared for consideration by the full Committee on Rules, is unusually frank and insightful. Although the political obstacles to its adoption are considerable, its recommendations deserve careful attention.

Diesel Automobiles: A Mixed Blessing?

The diesel car ranks as one of the best prospects for maintaining accustomed levels of automobile comfort and safety without sacrificing fuel economy. Even drivers who require undiminished performance can expect their diesels to use 25 to 30 percent less fuel than gasoline-powered cars. And apart from what safety may be derived from mere size and weight, the diesel, because its fuel is less volatile, is less likely to burn or explode in an accident—so much so that truck and marine insurance rates are discounted 10 to 15 percent when diesel power is employed.

However, the diesel's environmental impact is mixed. On the one hand, diesels produce far fewer hydrocarbon and carbon monoxide emissions than do gasoline engines. Indeed, this advantage is substantial when the entire production and distribution systems for diesel fuel and gasoline are compared. On the other hand, diesels emit 30 to 70 times more particulates (particles of unburned fuel) than do gasoline engines equipped with catalytic converters and burning unleaded fuel. And questions about the health effects of these particulates have dimmed the diesel's promise as a fuel-saving alternative.

Under the Clean Air Act Amendments of 1977, the Environmental Protection Agency is required to issue standards reducing diesel particulates to the maximum extent permitted by available technology, for vehicles made during and after the 1981 model year. In February 1979, EPA proposed regulations to hold diesel particulate emissions for all car models to 0.6 grams per mile in 1981 and 0.2 grams per mile in 1983. One year later, having concluded that diesel manufacturers needed more time to develop the necessary technology, the agency issued final regulations that postponed the proposed 1981 standard for one year and the 1983 standard for two years.

Even with this delay, however, the EPA has been forced to postpone compliance with the

nitrous oxide (NO_x) standard of 1.0 gram per mile mandated by the Clean Air Act. All manufacturers of diesel cars have now been granted waivers to emit an average of 1.5 grams per mile until 1983. The waivers are needed because currently available devices for lowering NO_x emissions raise particulates to such an extent that diesels fitted to comply with the 1981 NO_x standards would emit 0.5 grams more particulates per mile.

Both the NO_x and the particulate standards reflect the Clean Air Act's strategy of "technology forcing"—mandating levels of pollution control unachievable by current technology and hoping, like Mr. Micawber, that something will turn up. While this strategy is meant to overcome the lack of concrete incentives to develop pollution control technology, it leads to an obvious problem. If the needed technology does not turn up, Congress or EPA must waive or delay the standards, unless they are willing to accept responsibility for the resulting damage to the industry and the economy. But granting waivers when no honest effort at compliance has been made undermines the incentive to discover the technology in the first place. The central issue thus becomes whether the industry has made a good faith effort to develop the mandated technology; only if it cannot demonstrate such an effort will it be penalized. The inherently uncertain outcome of any inquiry into "good faith efforts" does not enhance the manufacturer's disposition to commit capital to fields subject to "technology forcing" regulation.

Moreover, technology forcing, particularly attempts at achieving quick reduction in effluent levels, may result in high-cost and relatively less effective technological solutions. The Council on Wage and Price Stability, in commenting on the proposed diesel regulations, noted that "the pressure of the original 1975 and 1976 standards for HC, CO, and NO_x, may have locked the American auto industry into its current catalyst technology, which [may be] less desirable than alternative technologies which might have been developed."

Economists, of course, would prefer economic incentives to the technology-forcing approach. In the case of pollution control, effluent fees set at an appropriate incentive level could be expected to lead to the desired reduction in emissions at less overall cost than technology-based standards. Whether EPA has the option of trying an effluent fee approach is doubtful. There is express statutory authority to use such an approach for stationary sources of pollution and large trucks, and perhaps for light trucks, but not for diesel passenger cars. The agency does, however, have the option of permitting corporate fleet averaging—requiring that a manufacturer's fleet rather than each model in that fleet adhere to the particulate standard. An averaging approach would work much like EPA's recently announced "bubble" scheme for regulating stationary source pollution. (See article by M. T. Maloney and Bruce Yandle, page 49, this issue.) It would allow an automaker to increase emissions where marginal costs of control are high if it could achieve corresponding sales-weighted reductions where costs were low.

Several automakers have proposed averaging plans, but they disagree on how the average should be calculated. General Motors's plan specifies a particulate standard much tougher than EPA's, but would apply it to an automaker's entire fleet, including gasoline-powered cars—which by now emit virtually no particulates. This scheme would impose an enormous hardship on Volkswagen and Mercedes, whose diesels are cleaner than GM's but represent a much larger percentage of their overall sales. Thus Volkswagen's counterproposal would keep the EPA standard but compute the average over only the automaker's diesel fleet. CWPS also favors a diesels-only average—on cost-effectiveness grounds.

EPA has rejected both averaging plans. It does not deny that averaging would lower the costs of meeting the particulate standard; but it notes that automakers have not offered figures detailing the expected savings, and it expresses concern over the differential impact of the plans among automakers and the administrative burden of monitoring the sales of each model. (As to the latter point, it may be observed that federal fuel-economy standards now operate on just such a sales-weighted system.) EPA has, however, set up a task force to study averaging, with an eye to developing a scheme for upcoming regulations on heavy-duty truck NO_x emissions, and says it will use that study to determine the feasibility of averaging for other mobile source pollutants.

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based standards in the 1970 Clean Air Act was heralded as a major breakthrough in pollution control. After all, if the equipment is in place and working, pollution is being regulated, though probably in a very costly manner.

In the years since 1970, as control technologies have been developed and applied on a fixed percentage-reduction basis, industry, government, and private scholars have generated information about control costs, especially incremental costs. Monitoring techniques have also been improved as experience has brought a better understanding of pollutants and how they move when discharged. This learning process, though slow and haphazard, has ultimately filled much of the knowledge gap and led to a growing recognition of the possibilities for more cost-effective regulation.

Two questions remain to be answered. First, while it is clear from the evidence presented here that the savings from plant and regional bubbles are very large, are these savings large enough—in all situations, or some—to offset additional monitoring and administrative costs and still generate net social benefits? What is mostly needed here are specific cost data on the monitoring task. Second, will EPA pursue the new regulatory approaches suggested by the accumulating evidence—will it, in other words, facilitate the development of an emerging market in emission rights—or will it stand in the way? In this connection, the agency's first action on a petition from a state for bubble-approving authority presents cause for concern. On March 11 the EPA rejected New Jersey's request that authority to approve plant bubbles be included in its state implementation plan. Given the nation's urgent need to lower the cost of cleaner air, it is to be hoped that the bubble is an idea that cannot be denied much longer. ■

Selected References

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Apart from the question of how diesel particulate-reductions are to be achieved, there is the even more basic question of whether, and to what extent, such reductions are medically, rather than merely aesthetically, desirable. The actual health effects of the diesel are by no means clear. EPA's "White Paper" states:

> Extensive research into the health effects [of chemical substances absorbed by diesel particulates] is underway. Many undoubtedly are toxic. Others, such as polynuclear aromatic hydrocarbons, are known to cause cancer in animals and produce mutations in bacteria. Although it is too early to draw definite conclusions . . ., available data suggests that serious concern is warranted.

The automobile industry, on the other hand, points out that work-place exposure studies have failed to find significant negative long-term health effects, even though diesels have been in use for a long time.

In light of the possible health risks, one is inclined to be more sympathetic to EPA's stringent position on permissible overall particulate levels than to its reticence in adopting fleet averaging to achieve those levels. The averaging approach is demonstrably more efficient and has been applied effectively in other regulatory fields. Of EPA's reasons for further study, one suspects that the reason carrying the heaviest weight is the political difficulty of determining what method of averaging to employ, given the widely varying effects of different methods upon particular firms. Yet surely a flat emission level, as contrasted with any of the various averaging approaches, also has a differential effect. That is to say, some companies will be more affected than others by a uniform limit applicable to all diesel vehicles—so evenhandedness is hardly a rational justification for that approach. At most, one can say that the force of established regulatory habit makes the across-the-board limit *appear* less preferential, or makes EPA *appear* to be avoiding the inevitable preferential choice. On an issue that bears appreciably upon our major problems of inflation and energy, concern with appearances is a luxury we can ill afford.