Perspectives
on current developments

Bilingual Education: The New Accent in Civil Rights Regulation

The Department of Education's bilingual requirements, published last August as the first major regulatory proposal of the fledgling department, have aroused a storm of complaints about federal meddling in local affairs. They would require students with "limited English language proficiency" to be taught substantive courses in their native languages whenever there are twenty-five or more such students in two consecutive grades. The nationwide cost of compliance is estimated to be as high as $3 billion over the next five years. The department has denied from the outset that this regulation constitutes intrusion into local school policies, characterizing it rather as a basic civil rights measure, a simple guarantee of "equal access" for students with English language difficulties. Whatever the merits of the current proposal as policy, its presentation as a "civil rights" measure deserves a closer look in itself, because that reveals some of the more general problems associated with the elaboration of civil rights regulation in recent years.

The only statutory power on which the Education Department relies for imposition of its bilingual requirements is the authority to implement Section 601 of the Civil Rights Act of 1964, which provides:

> No person in the United States shall, on the basis of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance.

Because the Civil Rights Act was fiercely resisted at the time by champions of "states rights" (and, to be sure, by quite a few open defenders of racial segregation), it produced one of the most voluminous legislative debates in the history of Congress. Nowhere in this swollen record is there any indication that Congress intended its prohibition of discrimination "on the basis of national origin" to have anything to do with language, except to ban overt bias against an individual merely because of his foreign accent. There is nothing to suggest an affirmative obligation to provide services in foreign languages so that persons of foreign origin might be more readily able to benefit from them. If Congress had any such notion of bilingual requirements, it would surely have imposed them *first* in the much more basic field of voting; but not until 1975 did it require election information and assistance to be provided in foreign languages—and it did so quite specifically, rather than through an obscure reference to "discrimination on the basis of national origin."

As with the hiring quotas promulgated under other sections of the 1964 Civil Rights Act, the application of Section 601 to language problems has been entirely a matter of questionable administrative "interpretation." And as with hiring quotas, the extension of the "national origin" protection to language problems has been a gradual and elusive process. Yesterday's tentative suggestions become today's hardened dogmas, the shift in emphasis never being squarely presented for public debate and no one at a high level of political accountability ever taking clear responsibility for the new approach. The impositions are first made upon notorious "bad actors," who in a sense deserve them for their past discrimination, and who are unlikely to enlist support from the rest of society or the courts; once established in this context, they are universalized, with plausible reliance on past administrative practice and judicial approval.

Enforcement of Section 601 in the area of education (through the sanction of terminating federal funding to any school district that does not cease "discriminatory" practices) was committed to the Department of Health, Edu-

cation and Welfare, until the formation of the Education Department last year. Throughout the 1960s, the regulations and policy guidelines issued by HEW's Office for Civil Rights gave almost no attention to the problems of "national origin-minority group" students, and when OCR first broached this issue in 1970 it did so with a policy memorandum to school superintendents and state education officials, not with a new set of regulations. By comparison with what it was later to develop into, that memorandum was a paragon of reason and moderation. It warned, to be sure, that the schools would be considered in violation of the Civil Rights Act (and their federal funding thus be at risk) if they did not take affirmative steps with respect to the special needs of national origin-minority group students. But those needs were described as "language skill needs," and the steps envisioned were those that would teach English. Not a word about teaching other subjects in the minority language. The memorandum said:

> (1) Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program . . . , the district must take affirmative steps to rectify the language deficiency. . . .
>
> (2) School districts must not assign national origin-minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor . . . deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.
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> (3) Any ability grouping or tracking system employed . . . to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track.

Enforcement efforts in this area over the next few years concentrated on school districts in the Southwest where, according to local complaints, Mexican-American children were often left to vegetate in classes for the mentally retarded merely because of their language difficulties. Given a history of strained relations between "anglos" and "chicanos" in many of these districts, such callous school practices might quite reasonably be attributed to the sort of clear ethnic bias that Section 601 was intended to prohibit. OCR did require many of these school districts to inaugurate instruction in Spanish, but that requirement was presented as a concrete "remedy" for past discrimination —even as busing programs to achieve racial balance were individually tailored remedies for official segregation in the past, rather than a generally applicable requirement of the law.

HEW's commitment to bilingual education picked up considerably after the Supreme Court's 1974 decision in *Lau* v. *Nichols*. That was a class action by non-English speaking Chinese students against officials of the San Francisco Unified School District, which had a history of segregated Chinese schools (California law in fact provided de jure separate schools for orientals until 1947) and had been integrated by a federal court decree only three years earlier. The plaintiffs sought to impose "no specific remedy" for the problem of language deficiency, but only asked "that the Board of Education be directed to apply its expertise to the problem and rectify the situation." The Supreme Court held, unanimously, that such relief was appropriate under Section 601, relying upon—and affirming the validity of —HEW's 1970 memorandum.

Within a year after this decision, HEW had produced a lengthy document known as the "Report on *Lau* Remedies." It essentially established bilingual instruction as the approved approach unless a school district could show that its own approach would be "equally effective"—a formidable challenge, given the lack of consensus among education experts on the "effectiveness" of HEW's own approach. Unlike the 1970 memorandum, the "Report on *Lau* Remedies" was not even published in the *Federal Register*; but it has since been used by HEW (and later the Department of Education) as the basis for "compliance agreements" negotiated with some 500 school districts charged with or suspected of discrimination "on the basis of national origin."

In light of this history, Education Department officials now claim, with some truth, that their August proposal is largely a more detailed and formal restatement of existing policy, rather than any radical innovation. But school offi-

cials around the country protest, with just as much truth and much more reason, that any bilingual instruction policy that has previously existed was formulated behind closed doors and selectively applied; and that civil rights enforcers have never set it forth as a proposed generally applicable requirement in a formal rulemaking proceeding, and exposed it to the full public discussion (and political attention) that such proceedings can provide. And even now, they complain, the department has solicited comment only on peripheral details in the August proposal, while apparently treating the basic commitment to bilingual instruction as settled policy.

Bilingual instruction requirements are characteristic of a shift in the concept of civil rights guarantees, from equality of opportunity to equality of results. The proposed regulations take for granted that an institution discriminates unlawfully, not merely when it engages in directly invidious treatment of a particular group, but when it fails to take affirmative steps to overcome the peculiar problems of that group. In this respect, they are similar to the regulations defining "discrimination" against the handicapped (under a vague statutory provision modeled directly on Section 601 of the Civil Rights Act) as the failure to install access ramps and elevators for those confined to wheelchairs, the failure to provide braille texts and readers for the blind, and so on.

Providing such special treatment for some of our disadvantaged fellow citizens is, in many cases, unquestionably sound social policy; but doing so under the guise of constitutional or statutory proscriptions against "discrimination" has considerable cost. It cheapens the currency of constitutional rights; it removes a large number of social judgments from the political process and entrusts them to the federal bureaucracy or the courts; and it tends to prevent needed flexibility, since the issue comes to be discussed in the context of what special treatment the law "requires" rather than what is desirable and feasible.

The bilingual regulations are a particularly good example of the last deficiency. In its effort to render "nondiscrimination" requirements more precise, the Education Department has come to adopt more and more arbitrary assumptions about the nature of the problem and the method of solution. Thus, the latest regulation provides that students must be given separate instruction in their "primary" language if they score below the fortieth percentile in standardized tests of English proficiency (the schools are left free to use for comparison the scores of students within their own district, their own state, or the nation as a whole). But even in school districts where almost all students are native speakers of English, four-tenths of the students necessarily will score below the fortieth percentile in English proficiency tests. Why must those students within that four-tenths who have a second language receive special services by federal mandate, while those who may be equally deficient in English skills but have no other "primary" language are left to their own devices? On the other hand, it is by no means clear that the language barrier in itself is the only or even the primary obstacle to effective schooling for children of foreign backgrounds. A large proportion of these students come from homes where poverty, cultural dislocation and a variety of other hardships associated with immigrant status may hamper their adjustment to the learning disciplines of the typical American school. There is indeed no consensus among education experts that bilingual instruction really is the most effective or suitable means of easing such children into the educational mainstream. The Department of Education itself acknowledges that further research and experimentation in this field is necessary, though it has proposed to allow only a small number of "pilot" programs to deviate from the requirements of the August proposal.

As we have suggested, this arbitrariness in many of the assumptions underlying the bilingual instruction proposal is not surprising. It is the natural consequence of converting a prudential social judgment into a legal imperative. Only arbitrary assumptions can convert complex problems into clear violations of law, and thus render enforcement simple. "Discrimination," which includes the failure to meet the special language problems of national origin-minority students, has been prohibited by law; but how can one enforce a law that merely requires schools to do "the best they can"? Thus, in the end, the chief attraction of the bilingual approach for civil rights enforcers is that it constitutes, at any rate, something concrete that can be required of schools.

It seems unlikely that the proposed regulations will be adopted under the Carter administration and even less likely that they would be continued under President Reagan. That will not necessarily put an end to the problem, however, but may merely shift the battleground from the agencies to the courts. So long as it remains the law (as *Lau* has held) that some social programs with respect to non-English language students are mandated by the prohibition against discrimination, private plaintiffs will have the right to demand, and federal judges to decide, that particular programs be provided. As noted above, the plaintiffs in *Lau* sought a quite unspecific remedy; future plaintiffs, in the event the Education Department regulations are not adopted, will not be so accommodating. It is easy to envision a federal judge deciding that, yes, in this particular case, only bilingual instruction will suffice. To prevent this outcome —or at least to make an effort at doing so—it would be necessary for the new administration not only to drop the proposed regulation, but also to alter the administrative interpretation, set forth in the 1970 memorandum and relied upon by the Supreme Court in *Lau*, that failure to provide special services to foreign-language students constitutes "discrimination on the basis of nationality." Even then, it is far from clear that the Court would alter its *Lau* holding. How much deference it accords to administrative interpretation tends to bear a remarkable similarity to the results it independently desires to reach.

International Nanny—Regulating Hazardous Exports

The problem of U.S. export controls on hazardous substances is nicely exemplified by what might be known in cosmopolitan regulatory circles as L'Affair Tris—the episode involving children's sleepwear treated with a flame retardant of that name. U.S. manufacturers had added the substance to their product in order to comply with a Consumer Product Safety Commission determination that children's sleepwear that was not flame retardant was unsafe. Come to find out, Tris was even unsafer. In April 1977 the CPSC determined that it was a potential carcinogen and banned domestic sale of Tris-treated garments. Not until 1978, however, was export sale prohibited, and in the interim U.S. manufacturers allegedly unloaded abroad some 2.4 million of their domestically unsalable Tris-treated garments.

Callous indifference on the part of the manufacturers, it would seem—though that would depend upon the existence and reasonableness of disagreement on their part with the CPSC's carcinogenic finding. But *surely* callous indifference on the part of the government which had made that finding, and which determined to protect U.S. babies but not foreign babies. And surely good cause for foreign governments to become annoyed at Uncle Sam. But add a few assumptions. Suppose the governments of the importing countries knew of the CPSC ban and thought it an act of saccharin-like stupidity; or suppose that, in their countries, the risk of infant burns was greater than here and its avoidance thus worth some marginal increase in the risk of cancer. Or if that seems implausible, then consider the original CPSC ban on ordinary cotton children's sleepwear. Should that have been extended to exports as well—even though, in the poorer countries, the substantial added cost for the flame-retardant protection would price the product beyond the average citizen's means? Might not those countries take some offense at our deciding for them, on the basis of our affluent standards, the appropriate trade-off between safety and price?

The controversy surrounding L'Affair Tris produced within our government the formation of the Interagency Working Group on a Hazardous Substances Export Policy, consisting of representatives from some twenty agencies and chaired by (you would never guess) Special Assistant to the President for Consumer Affairs Esther Peterson. The Fifth Draft Report of the Working Group was released on August 12. Its identification of the problem seems unexceptionable enough: unrestricted export of dangerous substances would tarnish the reputation of American products abroad, damage U.S. foreign relations, and default on our moral obligation to protect the world environment and the health and safety of foreign citizens. But how to meet that problem is by no means clear.

As the children's sleepwear example suggests, it seems reasonable to extend some of

In Brief–

The ICC Keeps Reform Rolling. Several months ago (May/June 1980), we noted some deficiencies in the trucking deregulation bill then coming out of Congress, and we commented that the bill's effect would "depend to a considerable degree on the ICC's continuing disposition toward increased competition." That disposition clearly continues.

The Motor Carrier Act of 1980 was signed on July 1.

- On July 3, the ICC published for public comment the major portion of its implementation package. Included were relaxed procedures for applications for operating authority—among them rules that, in exuberant obedience to Congress's call for broader categories of commodities authorized by carrier certificates, compress literally millions of commodity categories into a mere forty.
- On August 21, the ICC proposed steps to reduce the antitrust immunity enjoyed by motor-carrier rate bureaus to the minimum level consistent with the will of Congress.
- On September 16, the ICC published for comment new rules to allow two-way hauling and to eliminate gateway requirements and circuitous routes.
- Other proposals of a similar nature are in the works.

The Reagan administration will have a tough time surpassing the deregulatory record of the present commission; and some doubt that it will even match it.

Punching Clocks in the Groves of Academe. Faculty members and university administrators are uneasy about a set of new record-keeping requirements currently being implemented on their campuses. According to Circular .No. A-21 (revised) of the Office of Management and Budget, college professional and nonprofessional personnel who work on federally sponsored research, instruction, and other activities must now account for how they spend 100 percent of their working time—including time spent on professional activities that are not federally sponsored. The new requirements, like similar OMB rules for federal contractors in other fields, are intended to crack down on waste and misuse of funds. OMB argues that, without the 100 percent requirement, government cannot be sure that universities are not reimbursed twice for the same activity of a single individual.

The new rules might have some beneficial effect in holding down costs. It is true, as pointed out by Yale President A. Bartlett Giamatti, that faculty activities of research, teaching, service, administration, and so on overlap so much that trying to compartmentalize them into discrete categories totaling 100 percent is "misleading at best and dishonest at worst"—which is to say that erroneous compartmentalization will generally be undetectable. And it is also true that the cost-constraining effect of the new mandate will be particularly feeble in dealing with a profession in which there is no specified number of hours per week that must be devoted to any activity other than the actual teaching of classes. ("See here, Professor Einstein, your time sheets show that you spent only two hours last week on committee work but twelve hours on perusing professional journals!") Still, the OMB directive may occasionally prevent the dishonest and stupid researcher from billing fifty hours to the government and fifty hours to IBM in the same week. The question is whether this occasional benefit will be worth the cost of converting the academic life into a metered profession.

Intellectuals are beginning to learn the hard way that, when the government weighs its benefits against someone else's costs, ounce for ounce, the former are heavier. ■

our domestic restrictions to exports, but surely not all of them. For some restrictions, such as automobile emission standards, the cost-benefit trade-offs are simply not the same abroad. Imposing them would be an act of international churlishness rather than amicability. It would also be an act of singular ineffectiveness and self-laceration, since products not complying with our solipsistic standards would simply be sold by manufacturers from other countries—or, worse still, our own manufacturers heavily dependent on export trade might conceivably relocate abroad.

Once it is determined to draw a line between what might be termed universal and purely domestic restrictions, the first question to arise is who shall draw it. The decision can hardly be left to the domestic regulatory agency alone. What does the Environmental Protection Agency know—or care, for that matter—about the strength of Brazil's desire to obtain a particular pesticide that has some undesirable ecological effects? The working group's answer to this first problem is the establishment of an "interagency task force" to advise the Departments of State and Commerce on which products should be included in the government's Commodity Control List and thus be subject to export licensing requirements.

As for where the line is to be drawn, the draft report proposes a multi-stage process consisting of (1) the identification by the appropriate regulatory agencies of "substances, products, and classes of products which have

been banned or significantly restricted in the United States" under specified statutes dealing with hazardous substances (namely, the Federal Insecticide, Fungicide, and Rodenticide Act, the Toxic Substances Control Act, the Food, Drug, and Cosmetic Act, the Federal Hazardous Substances Act, the Consumer Product Safety Act, the Public Health Service Act and the Flammable Fabrics Act); (2) the review of this list of substances by an interagency task force chaired by the Department of State and composed of the Department of Commerce, the Food and Drug Administration, EPA, CPSC, the Office of the United States Trade Representative, and the Council on Environmental Quality for recommendation to the State Department as to which substances should be included on the Export Commodity Control List; and (3) after receipt of such recommendation, decision by the State Department, subject to the concurrence of the secretary of commerce, as to which substances will be restricted for export.

The crucial part of this process, because it is the nondiscretionary part, is step (1)—which identifies what might be termed the candidates for export control. The draft report's description makes it sound as if this net is cast no more broadly than to cover products already tried and found wanting under U.S. law—and that any product ultimately selected from this list for export restrictions will be one which the exporter and the government can readily identify. Neither is the case. Among the products that are "significantly restricted" domestically are those as to which a requisite license or approval has simply not been sought. Such products *may* be hazardous; but there has been no government determination to that effect, and the proposed export policy would in effect require such new determination to be made. (The export policy would not create this problem for new drugs; the law already prohibits their export unless they have been approved for domestic use. It would also not create this problem for pesticides, only because the draft report quite inconsistently excludes from the "significantly restricted" category "pesticides for which registration has never been sought.")

As for the ready identifiability of the restricted product: *Most* domestic restrictions take the form not of a ban or an approval requirement applicable to a particular product, but of a rule or standard mandating certain characteristics (such as the flame-retardant standard for children's sleepwear, which produced Tris). The particular products that fail to comply with such standards are not known in advance and cannot be established without some adjudicatory proceeding. Thus, if the class of products "non-flame-retardant children's sleepwear" is included in the list of products eligible for export restriction (as the draft report envisions), and if—after steps (2) and (3) are completed—it is ultimately selected for such restrictions, enforcement of the restriction will require the government to conduct proceedings to establish the fact of noncompliance. Or to look at the matter more realistically, the avoidance of restriction will require the exporter of products destined exclusively for export to undergo such proceedings to establish the fact of compliance.

Of course once the candidates for export restriction have been identified, however vaguely, under step (1), there remains the chore (imposed on the interagency task force and, ultimately, on the State Department) of selecting from among them the winners that will be subject to export restriction. And after that, the chore (imposed upon the secretary of commerce, in consultation with the State Department and the regulatory agency with authority over the hazardous substance) of determining whether an export license request for a restricted product should be granted. With respect to these determinations, the draft report provides a smorgasbord of "factors to be considered." Two of these are "the importance of the beneficial uses of the substance" and "the benefits to be gained by the export." It is amusing to note that, after each of these factors (found in widely separated parts of the report), there is a disclaimer of any intention to impose "a rigorous, quantitative analysis of costs and benefits" —"as is usually performed," the first disclaimer adds, "in domestic regulatory procedures."

After reviewing this lengthy process, one begins to wonder whether the game is worth the candle. The chemical, drug, and pesticide industries, needless to say, think it is not. Even the Public Citizen Health Research Group finds the draft report's recommendations "too cumbersome" to be effective except in the rarest of circumstances. Such environmental and health groups would prefer the simple approach that

any substance not permitted to be manufactured or sold domestically should not be permitted to be exported as well. There is a lot to be said for simplicity. But perhaps the opposite simplicity is called for here—a continuation of the rough division of labor whereby, out of the sheer limitation of governmental capacity and the practical ceiling upon the number of people in any single society who can be lawyers, the U.S. government will look to the protection of persons within our territory and allow other governments to look to the protection of persons within theirs. There should be exceptions to this rule where the dangers to foreign residents are very great—or even where they are less substantial, but nonetheless clear and precisely identified, and the protection against them can be readily administered. But that hardly describes the scheme proposed by the draft report, which in theory permits the extension of all our domestic regulation of potentially hazardous substances to foreign exports and in practice requires product-by-product evaluations that have not previously been made.

The draft report provides the soothing assurance that "the number of substances which would be chosen for [export restrictions] is expected to be small." This may be doubted, given the makeup of the advisory group and the likely bureaucratic reaction that, after all, placing a substance on the control list does not absolutely ban its export, but merely requires a license. But even if the assurance is true, it overlooks the costs of pursuing the process to its conclusion and the continuing costs of evaluating exported products for compliance with restrictions that are not product-specific ("non-flame-retardant sleepwear" or "ladders that do not meet CPSC standards").

But—some might say—however much one disagrees with the outcome of the Working Group's deliberations, one must at least applaud the effort. It is scandalous that our society should not have given any consideration to protecting foreign residents against domestic manufacturers. But as it turns out, that is not the case. Almost all of the regulatory statutes to which the new policy would apply contain export restrictions considered necessary by Congress—ranging from absolute bans to requirements that the government of the importing country be notified. The draft report represents an effort to augment those duly considered legislative restrictions through executive action. The device employed is the Export Administration Act of 1979, which empowers the President to restrict exports in order "to further significantly the foreign policy of the United States or to fulfill its declared international obligations." The Working Group sought and obtained from the Justice Department's Office of Legal Counsel an opinion described in the draft report as affirming the President's authority under this provision to control the export of hazardous substances. The report disregards, however, the concluding sentences of that opinion:

> We would enter one caveat. . . . Certain statutes presently impose conditions on the export of hazardous substances, *e.g.*, the Toxic Substances Control Act, . . . requiring notice to the recipient nation of product risks. It may be that these statutes foreclose presidential discretion to take some actions, for example banning a product that a statute allows to be exported if notice is given. In the absence of a specific proposal, we have not researched such questions, and wish merely to alert you to them.

Such questions are indeed substantial. It would appear that, by including export restrictions in the various regulatory statutes, Congress (which has constitutional authority over foreign commerce) has made the necessary evaluation of the foreign policy interests involved. It is at least doubtful that the more general Export Administration Act confers upon the President authority to alter that disposition.

Some recommendations of the draft report may well be unquestionably sound. The report notes some deficiencies in what it describes as the primary means of satisfying our international interests and obligations—the notification of foreign governments that hazardous substances banned or restricted in this country are sought to be imported within their borders. The export notification provisions in existing statutes contain a variety of somewhat inconsistent requirements that might usefully be replaced by a more comprehensive and uniform approach, if that can be achieved without destroying necessary flexibility. The report suggests procedural changes to standardize the timing, frequency, and content of advance notification, along with the designation of the De-

partment of State as the official conduit and publication of an annual summary of all U.S. regulatory actions taken to control domestic and foreign trade in hazardous substances.

By and large, however, the recommendations of the Fifth Draft Report of the Working Group seem a familiar example of regulation overreaching both the capabilities of a less-than-omnipotent government and the considered dispositions of Congress. It is all well intended, of course—but regulatory overreach usually is.

Energy-Efficiency Standards for Appliances

On June 30, 1980, the Department of Energy proposed a regulation requiring eight categories of major appliances to meet minimum energy-efficiency standards before being placed on the market. The interim standards proposed would eliminate from the market about 50 percent of the refrigerators, freezers, clothes dryers, water heaters, kitchen ranges, room air conditioners, central air conditioners (other than heat pumps), and furnaces that were on the market in 1978. Most of the remaining 50 percent would disappear when the final standards became effective in 1986. The deadline for DOE's adoption of the pending proposals is January 2, 1981.

Originally, under the Energy Policy and Conservation Act of 1975, the Federal Energy Administration was to establish voluntary appliance efficiency targets, designed to achieve "the maximum improvement in energy efficiency . . . economically and technologically feasible" by 1980. The agency was charged with issuing mandatory standards only if and when it determined that the target for particular products was not likely to be achieved. In 1978, as part of President Carter's energy program, this provision was amended by the National Energy Conservation Policy Act to put the burden of proof for the issuance of standards on the other side: the Department of Energy was directed to issue standards unless it could make the affirmative determination that they would not result in "significant conservation of energy" or were not "technologically feasible or economically justified."

The appliance energy-efficiency standards were chosen by the White House's Regulatory Analysis Review Group as one of the ten or so regulations it examined in detail this year. RARG's report expresses grave doubts that DOE had demonstrated, as required by the statute, that "the benefits [of the standards] exceed the costs." The department sought to produce standards that would minimize life cycle cost (purchase price plus operating costs) for the average consumer. But, RARG points out, this approach ignores the realities that (1) life cycle cost is heavily influenced by usage rate (the less an appliance is used, the greater the proportion of total cost attributable to purchase price) and (2) for many of these appliances, usage rates will vary widely from any calculated "average." The inappropriateness of an average standard becomes immediately apparent when one considers, for example, the likely difference in usage rates for furnaces and air conditioners between Maine and Florida. Consumers in Florida would do well to pay more at the outset for more efficient air conditioners, because they will realize large savings in energy bills. Consumers in Maine, on the other hand, who would anticipate using air conditioners on only rare occasions, would be wasting money to invest heavily in energy efficiency. The opposite would be true for furnaces. RARG's analysis concludes:

> DOE's proposed standards may deprive whole regions of the country of the opportunity to buy appliances that are designed to be efficient and economical within that region. They will be forced to make do with appliances designed for somebody else, someplace else.

RARG also disagrees sharply with the department's conclusion that the effect of its proposed standards on small manufacturers, while severe, would be "acceptable." DOE acknowledged that many small manufacturers of covered appliances would not be able to meet the standards and would be forced out of business. With the appliance industry already characterized by a four-firm concentration ratio of over 60 percent, the Justice Department found itself "not prepared to conclude . . . that the predicted elimination of small firms from the market as a result of the proposed standards would have a negligible effect on competition."

More important than these criticisms of

DOE's analysis, however, is the fragility of the assumption upon which the entire mandatory-standards concept is based—namely, that consumer consciousness of energy costs cannot be relied upon to produce efficient purchasing (and hence efficient manufacturing) decisions. The emerging evidence from automobile, housing, *and* appliance markets, indicates that consumers are coming to prefer more energy-efficient products, and that producers are moving to meet those demands. The efficiencies thus produced are likely to be much greater, from Maine to Florida, than can possibly be achieved by a necessarily undiscriminating government-imposed standard. Consumer consciousness of appliance energy costs has increased since the 1978 law, it should be noted, not only because of the increased price of energy but also because of energy-efficiency labeling requirements imposed by the Federal Trade Commission in June 1979 (pursuant to the 1978 law).

It is not, however, only the federal government that is tempted to adopt the "quick fix" of mandatory standards. The 1978 legislation prohibited state standards from being imposed (without the approval of the secretary of energy) prior to July 1, 1980—the purpose of that prohibition being to give the secretary time to issue the federal standards. Since the expiration of that deadline, more than a dozen states have applied their own standards to some or all of the appliances that are the subject of DOE's proposal. However, the federal standards, when issued, will automatically preempt state standards that are *not* identical. Thus, whatever else may be said against federal standards, under the structure of the present legislation they at least have the unquestioned advantage of preventing the fragmentation of the appliance industry by state legislatures that display no more receptivity to free-market economics than does Congress. The desire for uniformity of restriction was indeed the reason appliance manufacturers supported the 1978 act.

It is possible, of course, to adopt a uniform national policy of *non*regulation—that is, to prohibit state standards without imposing federal. DOE can do this by concluding the present proceeding with a determination that a standard will not result in significant conservation of energy or is not technically feasible or economically justified. Another available alternative would be the issuance of federal standards, but on a regional basis. DOE in fact considered this alternative in connection with its current proposals, but concluded that it would not significantly increase energy savings. That conclusion was reached, however, without considering the efficiency issues raised by RARG. Regional standards, of course, would not entirely meet the objections discussed above. They would prevent the Maine-Florida inefficiences, but would not avoid inefficiencies attributable to usage variation unrelated to geography.

In light of the more market-oriented energy policies of the incoming administration and the opposition of the present administration's own RARG, DOE might wish to leave resolution of the appliance standard issue to the new secretary. Militating against this, however, is the fact that if any standards are to issue from the current proceeding they must be promulgated by January 2. Otherwise, the statute seems to require the department to repeat the special efficiency-standard rulemaking procedure of (1) advance notice of proposed rulemaking, followed no sooner than 60 days later by (2) proposed rule, followed no sooner than 60 days later by (3) promulgation of final rule. In any event, standards that are promulgated cannot take effect before 180 days after their publication—so that no matter what the outcome of the present proceeding, the new administration will have the ability to forestall its effect.

New from AEI

Reforming Regulation

Edited by Timothy B. Clark, Marvin H. Kosters, and James C. Miller III

Proceedings of a conference co-sponsored by AEI and the National Journal

Representatives from government, academia, the media, and the general public discuss proposals for improving government regulations, such as sunset legislation, the legislative veto, the regulatory budget, case-by-case reform, mandatory application of cost-benefit analysis, and the Carter administration's regulatory reform initiatives. The volume begins with overviews of the issues and concludes with assessments of the reform proposals and of the prospects for improvements in regulation.

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