
On the New Regulatory Reformers

Talk of regulatory reform used to focus on the substance of particular regulatory programs. Now the effort in Congress is mostly absorbed with proposals for changing basic procedures in the regulatory system as a whole. Even traditional champions of regulation cheer these proposals, claiming they will meet public concerns about excessive regulation. Will they? Below are two hopeful views from Congress and a less sanguine view from the Academy.

For Effectiveness and Efficiency: S. 262

Abe Ribicoff

THE YEAR FOR IMPROVING federal regulation has arrived. The momentum for reform is strong, and Congress is in a receptive mood. No fewer than fifteen regulatory reform proposals are pending before the Senate Governmental Affairs Committee, and action on those bills is a top committee priority. Moreover, the President has reiterated his commitment to more effective federal regulation by proposing a comprehensive reform measure.

Some of the proposals would require federal agencies to conduct and publish impact statements for proposed major regulations. The one that I introduced on January 31, S. 262, would require all federal regulatory agencies to consider the costs, benefits, and alternatives before issuing their rules and regulations in final form. This "Reform of Federal Regulation Act" now has thirty-one sponsors, including six committee chairmen.

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Federal regulation certainly has its problems. The committee's three-year *Study on Federal Regulation* (whose final volumes were published this year) identified and considered a wide range of concerns, including (1) lack of opportunity for public participation, (2) the close ties often existing between the regulated and those subject to regulation, (3) wasteful paperwork burden, (4) overlapping and duplication of responsibilities, (5) undue delay, (6) economic problems created by restrictions on entry and competition, and (7) questions on the cost and effectiveness of some "social" regulation. Despite these concerns, I believe that much federal regulation serves important purposes and needs to be continued. The question therefore is how we can make regulation better. The answer is not to set up new political controls on regulatory decision-making, but to create mechanisms that would ensure more systematic consideration of proposed rules.

A number of recent studies have pointed out the high costs of regulation. One of these, Arthur Andersen and Co.'s study for the Business Roundtable, found that forty-eight ma-

for companies spent \$2.6 billion in 1977 to comply with federal regulation in just six selected areas. We need to get a handle on these costs—to know what they are and how to minimize them. But we must keep in mind that the costs of inaction may be higher still. For example, according to EPA Administrator Douglas Costle, Hooker Chemical could have spent \$1.5 million back in the 1950s to build a landfill for the company's toxic wastes, but instead it dumped them into the Love Canal. That action has already cost New York State some \$23 million and, if Hooker Chemical is found liable for the health claims brought against it, might cost the company \$2 billion. Complying with regulation is often, on balance, a better bargain for society and for the regulated than the painful consequences or costly remedies that may be the result when regulation is sidestepped or nonexistent.

It is equally clear that government intervention can save consumers money. Take the case of brand-name and generic drugs. If a consumer buys a common tranquilizer under its heavily advertised brand name (Equanil), the price is \$7.50 per hundred, while if the same drug is purchased by its generic name (meprobamate), as little as 94 cents will be paid for the same quantity. That may be an extreme example. All the same, it is estimated that FTC's and FDA's proposals for encouraging greater reliance on generic drugs may cut as much as \$400 million from the nation's annual \$8 billion drug bill.

Principles of Reform

In considering the matter of cost-benefit analysis, it is necessary to make a distinction between two classes of regulation—economic regulation and regulation for the protection of health, safety, and the environment. These two classes have different purposes, present different measurement problems, and require different kinds of solutions.

Where economic regulation is concerned, the main costs are usually not compliance costs imposed on industry, but increased service expense for the consumer. As FTC Chairman Michael Pertschuk has put it, economic regulation is frequently "by business, of business, and for business." It may be possible to eliminate

this class of federal regulation. For example, I think the consumer would derive much benefit from the lifting of federal controls on the trucking industry. A virtually identical approach worked with the airlines, where the phasing out of traditional controls by the Civil Aeronautics Board aided not only the consumer but also the industry. And we should note that economic deregulation of the airlines has not cut into the Federal Aviation Administration's responsibilities for air traffic safety.

Thus, in the economic area, we should start with the question, Is regulation in this area necessary at all? But we cannot take this approach to health, safety, and environmental regulations. This is not to say, however, that we should ignore their costs. We should be looking for the most efficient and least costly means to achieve our goals, since there can be no justification for *wasting* resources.

The requirement for regulatory impact analyses in S. 262 will make a major contribution in this regard. S. 262 embodies three guiding principles advanced in the committee's *Study on Federal Regulation*.

First, impact analysis should be viewed as a useful *tool* for decision-making, not as a *rule* for determining whether a regulation should be issued. This is so because of the difficulty in quantifying benefits, and often costs as well—particularly in the fields of health, safety, and environment. Even the Business Roundtable study—which drew on the combined resources of some of the major U.S. companies, the talents of a leading accounting firm, and a research investment of hundreds of thousands of dollars—acknowledged major difficulties in reaching accurate cost estimates. Since we cannot, at this time, expect very much from the existing methods for determining costs—and certainly not for determining countervailing benefits—the decision on a regulation cannot turn only on cost-benefit calculations.

Second, it is not desirable to add further costly steps to the regulatory process. The requirement for economic impact evaluations should be as comprehensive as possible, but it should not be so complex and elaborate that it creates additional expense, delay, and confusion.

Third, in order to have the advantage of agency expertise, the analysis should be conducted *within* the department or agency con-

sidering a particular action. The adequacy and objectivity of in-agency analyses can be ensured through congressional oversight and by outside periodic review of impact statements.

The "Reform of Federal Regulation Act"

In accordance with these principles, S. 262 would require that every federal department and agency prepare a detailed analysis of the projected economic effects and the projected health, safety, and other "noneconomic" effects likely to result from a major proposed rule. This requirement would cover independent regulatory commissions, which currently are exempt from the impact analysis requirement of Executive Order 12044, issued in 1978. I am convinced that requiring *all* agencies to give systematic consideration to the economic impact of their proposals will produce more thoughtful final decisions.

The impact analysis will involve two steps. In order to expedite the regulatory process and encourage timely public discussion, a draft analysis would accompany the proposed regulations when they are first published for comment. This draft would contain a concise statement of the need for the proposed action along with any practical alternatives, giving in each case a preliminary estimate of impact (including economic impact) and relative effectiveness. Subsequently, after allowing at least sixty days for public comment on the initial analysis, the final regulations along with an even more detailed impact analysis would be issued.

Such analysis would be required, however, only if the statutory mandate of the agency permits costs and other external considerations to be taken into account. Some statutes direct that agency decisions be made solely on the basis of health and safety considerations. It is difficult to determine how an impact analysis requirement would work in those instances and, in any case, we do not want to reverse years of congressional action and deliberation by changing those statutes in this way.

Compliance oversight would rest with Congress. The Congressional Budget Office would periodically review the regulatory impact analyses of the agencies in order to ensure adequate agency compliance. The CBO reviews would be reported to the public, the Congress, and the agencies performing the analysis. Judicial re-

view of an agency's analysis procedures would be precluded in order to avoid lengthy litigation and the delay that produces. Court review would, of course, remain available for the regulation itself.

The bill contains other important provisions. For example, it would require agencies to establish priorities and reasonable deadlines for action and would also encourage the use of more informal procedures to cut down the amount of time spent on trial-type proceedings. In addition, it would require agencies to determine which *existing* regulations need re-examination and to publish a general plan for the review of those rules every five years.

I am pleased that the President's regulatory reform proposal, S. 755, parallels my bill in many respects. While there are differences, S. 755 does reflect the fact that the committee worked closely with the executive branch in identifying the problems and fashioning the needed reforms.

I would like to close with a final point on presidential review of regulatory decisions. Regulations should be considered on the public record, not behind closed doors. Recently there have been problems in this regard. In private meetings with agency heads, the President's economic advisers have pressed for changes in regulations, *after* the public comment period has ended. And changes have been made—on cost-benefit grounds—even in cases where the statutes provide that decisions be based *solely* on health and safety criteria. Recent smog and strip-mining rules have been modified, apparently as a result of White House influence.

When that occurs, are the discussions recorded and made part of the agency's record? Does the public have a chance to respond? How can a court review arguments and facts presented in secret conversations? Why should the judgments of admittedly unelected regulators be replaced with those of unelected White House staff members? Is it advisable to create yet another bureaucratic layer in the White House, with its often limited resources for dealing with complex regulatory issues?

I question whether a presidential "regulatory veto" protects the public's right to a fair process. There is, I believe, a better way. As is recommended in volume five of our study, presidential participation should take place on the public record and *at the beginning of the*

process—not *at the end*, when the public has no chance to comment. In that way, due process can be guaranteed, and agencies can still be *required* to consider important national concerns—such as inflation and paperwork—in drafting their regulations.

I am convinced that our approach will increase accountability as well as the opportunity for presidential leadership. Assume, for example, that EPA proposed a regulation contrary to established national energy policies. Under our proposal, the White House could do one of two things: it could formally intervene in the process, arguing against the proposed policy; or it could propose an alternate approach which the agency would have to con-

sider within a set deadline. In either case, the agency would certainly respond, because regulators do not operate in a vacuum. In my experience, they are highly sensitive to administration objectives—a sensitivity prompted by the President's appointment and budget powers. Serious and timely consideration would be given to the President's viewpoints, and national leadership would be asserted in a *public* context.

We must not cripple the ability of agencies to discharge their statutory duties. Nor should we lose sight of the important purposes served by health, safety, and environmental controls. What the people want is effective and efficient regulation. And that is the objective of S. 262. ■

On the New Regulatory Reformers

A More Demanding Standard: The Brown-Bentsen Bills

Clarence J. Brown

PUBLIC REACTION to burdensome regulation may turn out to be for the current Congress what Proposition 13 was to taxes and deficits in the last Congress—a force demanding change in government policy. Today, the cumulative *Federal Register* fills fifty-two large bookshelves and totals over 800,000 pages. The stack of volumes has grown in the past twenty years from ankle level to higher than I can reach—and I stand over six feet four inches tall. We are drowning in the flood of printed regulations.

Though this is a graphic illustration, shelf space for the *Federal Register* is not of course

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what concerns me. Rather, I am concerned about the costs these regulations impose on our economy—costs which Murray Weidenbaum's recent study for the Joint Economic Committee put at \$102.7 billion (including private sector compliance costs of \$97.9 billion and agency administrative costs of \$4.8 billion).

No one wants to repeal regulatory policies that produce substantial benefits for the public. But some regulatory programs impose excessive and unintended costs, often far exceeding the benefits they yield.

The Brown-Bentsen Bills

This is a problem we must deal with—and soon. Thus, on the first day of the ninety-sixth Congress, I introduced in the House and Senator

Lloyd Bentsen (Democrat, Texas) introduced in the Senate a package of four bills that we believe directly addresses the major regulatory problems:

- H.R. 75, "The Regulatory Cost Reduction Act," provides that federal agencies, when they promulgate regulations, must select the most cost-effective method of meeting the regulatory objectives.
- H.R. 76, "The Regulatory Budget Act," provides for a procedure under which Congress would set annually a limit on the amount of private-sector compliance costs each federal agency could require by its regulations.
- H.R. 77, "The Independent Agencies Regulatory Improvements Act," extends the economic analysis requirements of Executive Order 12044 to seventeen independent agencies which, because they are not strictly executive-branch agencies under presidential control, could not be covered constitutionally by an executive order.
- H.R. 78, "The Regulatory Conflicts Elimination Act," provides for a procedure under which conflicting and duplicative federal regulations would be eliminated, since it is senseless for a citizen to be put in the position where complying with one federal regulation requires him to violate another.

These bills should be part of any regulatory reform program enacted during this Congress. Some of the provisions they contain have been included in Senator Ribicoff's regulatory reform bill (S. 262), and many can also be found in the Carter administration's proposal (S. 755).

The main contributions of S. 262 are planning improvements and reform of the administrative procedures in federal regulation. The bill would reduce the serious delays that now plague the regulation process. It would also enhance efficiency in administration and permit better public participation in developing regulation. One of S. 262's controversial provisions is the requirement that government finance citizen group participation in the regulation-writing process. While input from consumers is certainly important, I have some doubt that we can make regulation more effective and less costly simply by supplying federal agencies with more information. Rather than adding (at taxpayer expense) to Ralph

Nader's already capable lobbying efforts, we should require the agencies to meet cost-effectiveness standards. The lack of such a requirement is a major gap in S. 262.

The Ribicoff bill does take an important step forward in calling for a regulatory analysis of existing and proposed regulations, but it does not take that next important step—spelled out in H.R. 75—of requiring that agencies adopt the most cost-effective method of regulation consistent with the agency's statutory obligations. Admittedly, a cost-benefit test for government regulations, as desirable as it might be in theory, would present some calculation problems in practice. For most regulatory programs, however, it is not necessary to calculate both costs and benefits—only costs. In enacting these programs, Congress generally presumes or sets a level of benefits to be achieved, just as it does with spending programs. Determining benefit levels is not, and should not be, the business of the administering agency—for it is a legislative function. The agency's function should be to achieve congressionally mandated goals at the lowest cost. There should, in other words, be no need for them to measure benefits; their efforts should be focused on measuring costs, which can be more accurately determined.

My proposals require that regulatory objectives be achieved in the most cost-effective manner, unless the head of the agency decides that the national interest requires the use of a less cost-effective alternative, and clearly explains why. Among the alternatives that should be considered are market disciplines and such approaches as voluntary industry standards. The definition of "costs" in my bills includes both administrative costs incurred by the government and compliance costs incurred by the private sector; but it excludes normal business or record-keeping costs that would have been incurred in the absence of such federal rules or regulations.

The recent study of regulatory costs done for the Business Roundtable by Arthur Andersen and Co. is relevant here. That study identified certain features characteristic of high-cost regulations. Rules requiring a particular compliance action or imposing a product standard rather than a performance standard, rules specifying engineering solutions rather than protective devices, and rules requiring con-

tinuous monitoring—these approaches almost invariably create a heavy cost burden for the private sector. Regulators who are probing for least-cost alternatives will find this study useful.

A Regulatory Budget

The primary contribution of the Brown-Bentsen package that is untouched by either S. 262 or the administration's proposal is the provision for a regulatory budget (H.R. 76). Current procedures fail to recognize that the goals of regulatory programs must be balanced against other national objectives. The achievement of any objective, public or private, uses resources that could be used for other purposes. The more resources devoted to one purpose, the fewer there are available for others. Even if all regulations were cost-effective, there still would be a need to establish priorities for the use of limited resources. This can best be accomplished by requiring Congress to set a regulatory budget.

In the past, the fiscal budget was quite adequate to show the impact of government on the economy, since almost all federal government activities involved direct taxation and direct spending. If one added to these the financial commitments (through loans, guarantees, and insurance) of some fourteen "off-budget" agencies, one could get a fairly clear picture of the government's influence on the economy. But with the recent rapid growth of the new regulatory agencies—the Occupational Health and Safety Administration, the Environmental Protection Agency, the National Highway Traffic Safety Administration, and many others—the fiscal budget no longer conveys a complete picture of government's impact on the economy. Most of the economic effect of regulation is hidden, since government-required private sector spending for auto safety, mine safety, pollution control, and consumer protection, plus the attendant paperwork costs, do not appear in the government's budget figures. They are cloaked in "off-off-budget" spending, required of the private sector to comply with federal regulation.

The clearest example of the need for a budget showing the economic impact of regulation on the society may be seen in the environ-

mental regulation of electric utilities. The massive cost of a smokestack scrubber to achieve cleaner air is passed on directly to consumers, who pay higher utility bills as surely as they pay taxes. But the federal budget fails to show these higher prices. It also fails to show the higher prices consumers pay because of economic regulation by such agencies as the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Communications Commission. The costs and benefits of both social and economic regulations should be more clearly available to policy-makers and to the public.

If these costs were minor, of course, their omission from the budget would not be a serious problem. But they are not minor, and they are growing. It is important, therefore, that the Budget Act of 1974 be amended to require that Congress annually establish a regulatory budget, along with the fiscal budget, to set a limit on the costs of compliance each agency could impose on the private sector in any one year. The timetable and the process provided for developing a regulatory budget under H.R. 76 would be similar to those governing the fiscal budget concurrent resolution. There is, however, a weakness in H.R. 76: it lacks a strong enforcement provision in the event that the budget resolution ceilings are violated. I intend to remedy this weakness.

Section 1107(a) of the bill declares that it shall not "be in order in either the House of Representatives or the Senate to consider any bill, resolution, or amendment . . . if enactment . . . would cause the level of costs of compliance for any agency to exceed the maximum costs of compliance established for that agency in the concurrent resolution. . . ." I doubt Congress would violate its own law and, even if it did, I doubt it would punish itself. But the provision is primarily directed against an agency's writing a regulation that would lift compliance costs above the ceiling. I am considering some options to forestall regulatory budget busting. One option would be a procedure to permit suits against the government in such a case. Another would be to reduce the fiscal budget of any agency that imposed compliance costs in excess of its regulatory budget ceiling.

Whatever its ultimate form, a regulatory budget would provide an incentive for the regulatory agencies to limit the compliance costs

that their regulations impose. It would certainly make the agencies more conscious of those costs. But it would have other important effects as well. A regulatory budget, along with the fiscal budget, would provide a more accurate picture of the federal government's total impact on the economy, allowing Congress to determine how much of the nation's output is to be devoted to public uses and how much left to private uses. It would make possible a better balance between regulatory programs and traditional government spending programs. It would enhance the protection of the public's health and safety by requiring that the federal government establish consistent priorities in pursuing regulatory objectives. The semiannual regulatory calendar, the first of

which was published by the Regulatory Council on February 28, 1979, could prove to be an important step toward a regulatory budget.

Although some regulatory costs are difficult to measure with current techniques, many costs are measurable, including the costs of required investment, paperwork, and changes in product quality. This is shown by the Business Roundtable's study. So, while I recognize that techniques for assessing regulatory costs are not fully developed, we have made some beginnings. And since the effective date of H.R. 76 would start with the fiscal year at least eighteen months after enactment, there would be time to solve the practical problems that remain. But we need the spur. H.R. 76 should be enacted as soon as possible. ■

On the New Regulatory Reformers

Reform as Totem— A Skeptical View

Ernest Gellhorn

ONE OF THE NATURAL WONDERS of the world is a place called Ayers Rock in the middle of the Australian Outback. There, rising out of a trackless desert, is the world's largest monolith. Massive and majestic, it is a sacred object of worship to the Aborigines of the Great Plateau. Though they do not know what it is for or how it got there, legend has it that the natives make frequent pilgrimages to it in order to show their reverence, which they do by scrawling primitive graffiti over its base.

Regulatory reform appears to be America's counterpart to Ayers Rock. No leader, it seems, can pass this totem without a bow of respect

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and a new proposal in legal hieroglyph. Few topics guarantee more attention from the press—and less understanding. It is a subject of universal favor. But it remains uncertain whether these propitiary offerings to the idol of reform will really have any effect on the problems of regulation.

Reformers have approached regulatory problems in recent times from three different directions. First, some concentrate on Congress, urging closer control of the agencies by intensifying committee oversight or adopting devices such as the one-house legislative veto. Second, others challenge the validity of entire programs, urging deregulation—as in the case of ICC controls of trucks and railroads—or proposing generic sunset laws that would allow

regulatory programs to lapse unless specifically renewed. Despite recent indications that congressional oversight can be quite effective and that specific deregulation can be spectacularly successful (as with airlines), Congress now seems preoccupied with a third approach to regulatory reform. This group of proposals assumes the desirability of and need for most regulation, and seeks to improve regulatory operation by concentrating on decision-making within the agencies. While the Ribicoff, Brown-Bentsen, and Carter administration bills vary widely in some particulars, each would require that every administrative agency, before adopting new regulations, assess the cost and benefits of the proposal. But they would still leave the hard decisions to the agencies themselves.

The appeal of this third approach is easy to appreciate when one totes up the vested rights and political strengths enjoyed by the beneficiaries of particular programs. For some, such as ICC-regulated permit holders or Teamsters employed to drive empty backhauls, the benefits run into billions; to the public, of course, these are among the heavy cost burdens of regulation. Are procedural reforms, then, really much more than a brief circus to go with the thinner bread of these inflationary times? Judging by past efforts and recent experience, the prospects for significant improvement are not particularly hopeful. One thing is clear: implementing any of these proposals would add another cumbersome step to an already ponderous process and lead to still larger agency and congressional staffs. If real reform resulted and administrative costs were, as a consequence, reduced, neither point would constitute a serious objection.

In fact, however, the prospects for such internal regulatory reforms in the agencies seem slim, at least as these bills are currently drafted. Their central provisions have already been implemented by President Carter's 1978 executive order that requires agencies subject to presidential direction to undertake an economic analysis of proposed regulations involving substantial burdens on the economy. The Carter order itself was essentially a revival of an order first issued by President Ford five years ago. Several years of these experiments, however, have certainly not lifted the curse of costly, ineffective, unnecessary, bothersome, and duplicative regulations. There is no reason to

suppose that better results will now be achieved simply by extending this regulatory impact requirement to the independent agencies not reached by prior presidential orders.

The Enforcement Problem

One of the most serious defects in the Carter order is its lack of any enforcement provision. To be sure, the usual reports must be submitted to the Office of Management and Budget (OMB) or to interagency monitors, but there is no penalty for noncompliance, nor any incentive to follow the spirit of the cost-benefit approach. This problem of nonenforcement is compounded in the Carter administration and Ribicoff bills, for they bow to fears of delay and interference from judicial review by explicitly precluding any judicial enforcement of regulatory analysis requirements. This effort seems unwise, and is unlikely to be successful. There is no reason to expect hortatory legislation to be any more effective than presidential exhortations. And experience with earlier congressional attempts to limit judicial review (as in the case of Clean Air Act emission standards) demonstrates that restrictions on judicial review are futile. They only encourage constitutional challenges and result in narrow or forced misreadings of the agency's statutory authority. Regardless of what the bills say, judicial review will somehow be made available. The only question is whether this fact is recognized now or after numerous appeals and several years of uncertainty. The explicit authorization of judicial review in the Brown-Bentsen bill is much more realistic. (On the other hand, its introduction of a new judicial review standard—a "deliberate or capricious disregard" of congressional intent—may simply add a confusing note to judicial proceedings.)

Even with the possibility of ultimate judicial enforcement, however, these proposals may not have much effect on the general pattern of agency decisions. Under the best of circumstances, judicial review only protects against extreme administrative abuses, serving as a warning or a standard for routine operations. The courts cannot possibly review every decision of a regulatory body. For these proposals to be effective, then, there must be some instrument to ensure routine compliance with the impact analysis requirements.

None of the present proposals, however, provides for meaningful authority to monitor compliance. Instead, they all rely primarily on the cooperative spirit of the regulators themselves. But since it is the regulators who are the problem, or at least a substantial part of it, one may wonder how effective this sort of remedy really can be; the rule against having foxes guard henhouses comes to mind. To be sure, all of the bills nominally provide for some outside monitoring: under the different proposals, agencies would have to file reports on their activity, variously, with the Congressional Budget Office, the Administrative Conference, the Comptroller General, or OMB. But none of the bills assigns direct responsibility for enforcement to these various monitors. As a practical matter they would probably function as filing repositories for meaningless paperwork. Certainly current experience with this "public lists and reports" approach—as reflected, for example, in the executive order program—suggests that the regulatory agencies are not going to be moved merely by moral suasion.

The Need for Central Review

If a regulatory impact requirement is actually to change agency decision-making, it should be enforced by a central agency speaking with the authority of the President or empowered to suspend rules and recommend reconsideration in light of cost or feasibility considerations. OMB would seem to be the appropriate candidate for this task since it already has developed a good deal of relevant expertise and experience in the course of its budget review activities. It could in any case develop the necessary capabilities with relative ease and without major growth in the bureaucracy (at least by comparison with the alternatives). How and by what terms this oversight responsibility should be arranged is a problem that deserves much close study and thoughtful analysis. The current proposals have not really begun to come to grips with the enforcement problem—a failing that may render all their other provisions largely futile.

The failure to provide for a centralized enforcement mechanism doubtless reflects, in some degree, an underlying congressional fear that such oversight might weaken or divert regulatory activity in behalf of health, safety, en-

vironmental and other laudible concerns. Such caution will probably ensure that cost considerations remain rather peripheral to the rule-making and standard-setting activity of many agencies. Yet in the long run the effectiveness and viability of federal regulation demands that costs be given as careful consideration as needs and benefits. For regulatory programs constitute a claim on the finite resources of the nation, as much as taxation and government spending. We cannot make rational decisions about the appropriate type of regulatory requirements to impose without fairly clear assessments of the relative costs of alternative options. Yet none of the present proposals provides for the sort of centralized control over regulatory costs that we currently maintain over federal expenditures.

The Brown-Bentsen regulatory budget looks at first like an easy short-cut to this goal. This proposal would establish an outer limit on the costs each agency could impose on regulated firms or institutions. Congress would be called upon to determine an overall regulatory cost budget as well as a specific budget for each agency. The scheme would thus retain agency control over regulatory programs, while highlighting for Congress its responsibility for deciding where and at what level regulatory cost burdens should lie.

While the general idea of a regulatory budget sounds promising, it does have some serious weaknesses. In the first place, one may doubt whether Congress or the agencies themselves would be able to anticipate the costs of particular regulatory schemes with much accuracy. Attempts by economists to calculate regulatory costs, both program-by-program and in the aggregate, have varied widely and been imprecise at best. Problems of attribution would be likely to generate as much controversy and confusion as questions of prediction: when the National Highway Traffic Safety Administration specifies the precise quality and placement of turn signals on new cars, for example, are the full costs of compliance to be charged to NHTSA's regulatory budget—even though most auto companies would have included the item in some form anyway? Whatever its appeal in principle, the regulatory budget might offer too many opportunities for evasion and self-delusion—given the difficulty of calculating costs—to be very useful in practice.

It also has certain basic conceptual problems. In mandating a cost ceiling, the Brown-Bentsen budget bill directs the regulators' attention to limiting expenses rather than to improving the ratio of costs to benefits. This would, of course, make sense if Congress had some idea of what costs it was willing to have imposed (and no corresponding ideas about the level of necessary or desired benefits). But that will not often be the case. Consider the NRC's enforcement of safeguards in the nuclear power industry: would we really want that commission to accept newly discovered risks (say, from design inadequacies revealed at Three Mile Island) simply because it had already imposed compliance costs on the industry reaching the mandated level?

These questions of implementation are common to all of the regulatory reform proposals. They all attempt to superimpose a single mechanical remedy on very disparate agencies dealing with complex and unrelated problems. In doing so, each proposes substantial additions to the Administrative Procedure Act and so would further complicate its already convoluted structure. Nor is it just a purist's objection to note that each of these reform bills ignores its own mandate to eliminate excessive regulation and to write rules in simple, plain, and understandable English. Written in the awkward style of government prose and using such terms as "cost effectiveness," they stand as further evidence of Congress's organizing principle—"do as I say, not as I do."

No Easy Answers

The underlying problem with the proposals is that they have all proceeded as if the current regulatory malaise has one single cause. But the problems of the administrative process are many; most are peculiar to a specific agency or subject. Even where general principles or common threads seem identifiable, their application will vary and they must be tailored to the particular problem at hand.

A realistic reform effort will not only shun simple solutions to complex problems, but it will also establish necessary priorities. Thus the first order for regulatory reform must be a systematic congressional program to examine and, where possible, cut back existing regulatory authorizations. Interstate Commerce Commis-

sion control of railroads and trucking seems a prime candidate, but there are many others. A second and closely related priority is for Congress to give the agencies more precise directions. It simply must face the hard questions and make basic value choices instead of always passing these questions to the agencies. Finally, as a third step, Congress needs to restructure and consolidate that regulatory authority which is to remain. Historical accident and interest group pressures rather than reason explain the division of transportation responsibilities among at least four agencies and departments, consumer protection among a like number, and antitrust between two. If conflicting and duplicative regulation is a worry, the proper remedy is to be found in Congress which is the original source of overlapping and conflicting authority.

Within this larger context, some version of the impact analysis requirement can make a useful contribution. Even then it needs revision so that a central review authority is given genuine oversight powers. Congress must also take the trouble to tailor this requirement to the special circumstances of particular agencies, so that what is required of NHTSA, for example, is not mindlessly mandated for NRC in the same stroke. In the final analysis, however, there is no substitute for the appointment of qualified agency leadership, leaders who understand the limits of their role, who are sensitive to the economic burdens of regulation and the ease with which authority can be abused. There can be no escaping the need for continuous and intense congressional and presidential oversight to ensure that the agencies are indeed being properly directed.

Reforms invariably go astray when they attempt to impose a plausible abstraction on an intractably complex and confusing reality. As George Bernard Shaw put it, "Reformers have the idea that change can be achieved by brute sanity." That is an apt summary of the strengths and weaknesses of these newest proposals for regulatory reform. Senator Ribicoff says that this is the "year for improving federal regulation." The Chinese say it is the year of the ram. Both may be right. It nonetheless seems safe to predict that by year's end Ayers Rock will be standing as it has before and the true path to regulatory reform will continue to elude us. ■