Perspectives on current developments

The Tariff Alternative

Initially one of the least controversial aspects of the Carter administration's new energy program was the establishment of a ceiling on annual oil imports at the 1977 level. Early criticism of the action largely focused on the claim that the ceiling was set too high—given the decline in demand for imported oil over the last two years—to make much of a difference. But now that it looks as if oil imports may bump up against the ceiling sooner than expected, the advisability of a rigid quota is likely to receive closer scrutiny.

The reconsideration might profitably begin with another look at the mandatory quota program used between 1959 and 1973 to protect domestic oil and gas production against much cheaper foreign oil. That program did indeed allow a higher level of domestic production than would otherwise have been possible. But recent studies indicate that it also raised consumer prices more than was necessary and introduced numerous distortions and inefficiencies in the U.S. petroleum industry (see "Readings," p. 56).

There are, in fact, many good reasons why governments usually rely on tariffs, not import quotas, to protect domestic producers. By setting the tariff at a sufficiently high level, the routine level of imports can be reduced almost as surely as under a quota. But a tariff scheme also has the flexibility to accommodate sudden surges of import demand (say, from an unanticipated disruption of domestic production) without the awkwardness of official changes in policy.

In the long run, moreover, a tariff should provide the U.S. government with more economic leverage to contain energy costs than a fixed import quota. Cutting back on our level of imports, whether by quotas or tariffs, cannot in itself force a reduction in OPEC's oil price. The cartel has demonstrated again and again both the willingness and the ability to reduce production in order to keep oil supplies tight in relation to anticipated demand—thus maintaining higher prices even at times when overall demand has declined. In contrast to a tariff, however, a quota would remove existing market incentives that might lead OPEC to moderate its price for the sake of larger sales—since the quota would preclude sales above the given level in any case.

Professor Morris Adelman of MIT, a leading authority on international petroleum economics, has recently suggested that a tariff arrangement could actually be designed to sharpen the market incentives for OPEC to restrain price increases: if a tariff schedule imposed disproportionate increases in import duties for each increase in the original overseas price, foreign producers might find that large price increases cut demand so much as to be unprofitable. At all events, any tariff would return some share of U.S. expenditures on imported oil to the Treasury. A quota scheme, on the other hand, would allow foreign producers to retain all the profit they make in selling oil at the highest price they can get. Finally, just as the quota removes any incentive for foreign producers to moderate prices for the sake of greater market shares, so it also reduces the pressure on domestic producers (those that are or will be decontrolled) to curb their prices—since foreign competition is forcibly prevented from taking any market share above the quota level.

What can be said for the quota, in contrast to the tariff, is that it will have no immediate effect on prices. Until the demand for imported oil actually reaches the specified ceiling, the quota will do nothing to induce shortages (or resulting price increases)—only because it does nothing to restrain imports. At some point, though, rising demand will cause the quota to "bite," and President Carter has announced his intention to lower the quota level gradually over the next few years so that it will "bite" more and more deeply as time goes on. For all the reasons enumerated above, the price increases that occur when that happens are likely to be considerably steeper than they would have been under a tariff. Those ultimate increases will be much harder to trace to the government, however, than the price increments imposed by a tariff. For that reason alone, they may be more acceptable to public officials than they should be to consumers.

Last, there will still be the problem of determining who will get access to the limited amount of oil allowed into the country under the quota. In the near term, the quota may produce aggravating oil shortages in the United States, if demand for petroleum products rises at a faster rate than new sources of domestic production. But even after production has caught up, the price of new domestic energy supplies will probably exceed OPEC oil prices for the foreseeable future, so that various sectors of the economy or regions of the country will remain eager for preferred access to imported oil. It was precisely the government's effort to allocate these valuable importation "entitlements" on the basis of (politically articulated) "need"—rather than by the market criterion of readiness to pay—that caused the inefficiencies and distortions associated with the oil import controls in effect between 1959 and 1973.

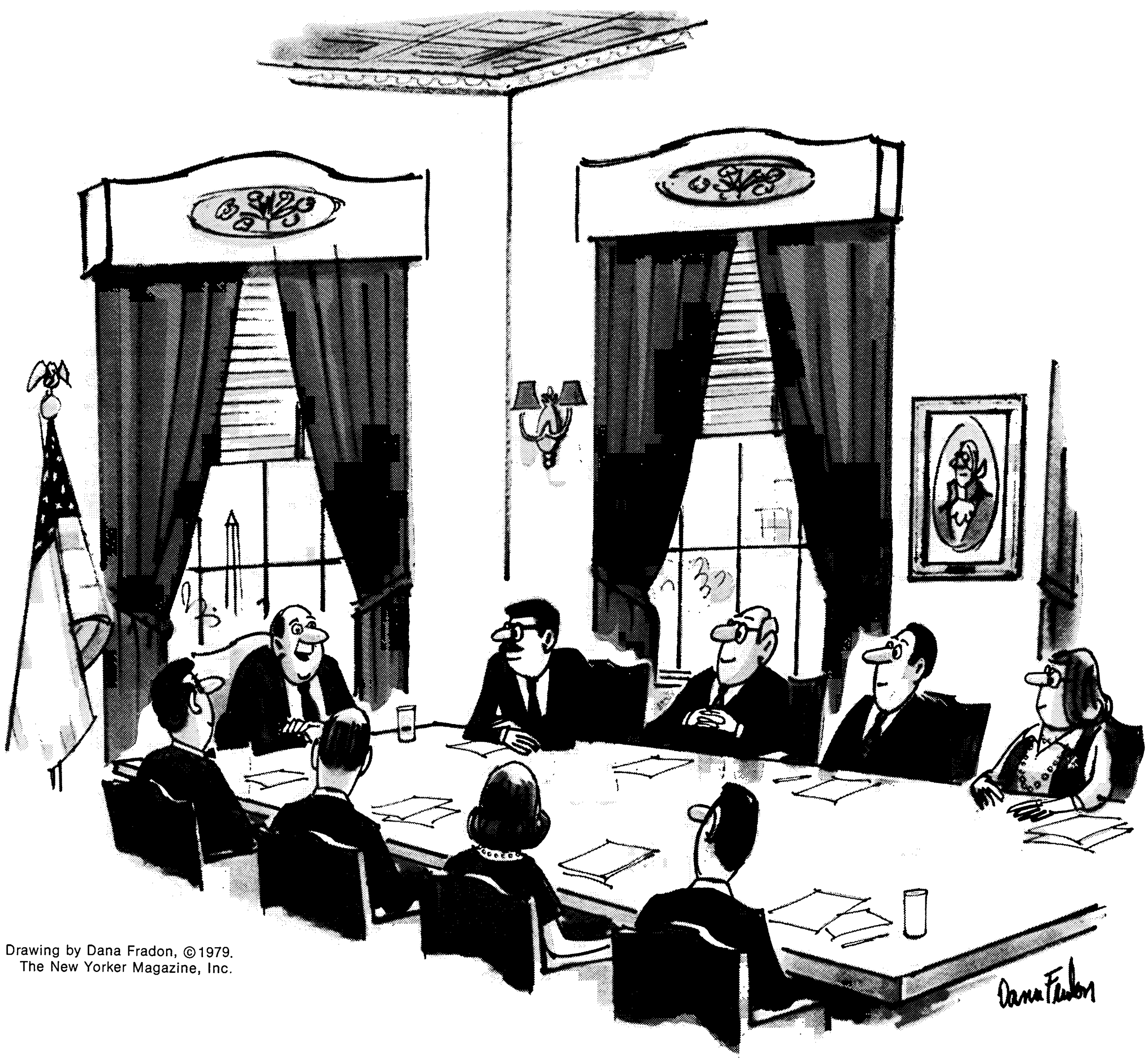
This time officials at the Department of Energy say they are considering the possibility of simply auctioning import licenses to the highest bidders, thereby retaining some of the efficiencies of a market system and avoiding the need for a cumbersome administrative apparatus to oversee politically determined allocation formulas. But it remains to be seen whether the Carter administration will really be able to bring itself to embrace a market-like mechanism to determine who will be the victims of government-mandated shortage. It could ask Congress to appropriate direct subsidies to particular industries or regions to enable them to bid more readily for scarce imported oil (or to cover the increased costs of purchasing domestic oil). This would be more efficient than trying to assist hardship cases with favored access to imports under an administered allocation scheme. But it would also make the costs of the quota program more visible—whereas its main advantage seems to be in concealing costs. Further developments on this side of the quota program should be awaited with interest, then, if not quite with optimism.

Mobilizing the Energy Regulators

Certainly the most novel element in the administration's energy plan is the call for an "energy mobilization board" to speed regulatory decisions affecting new energy projects. Such a radical departure from traditional practice is an implicit confession of serious regulatory failings in the past. But whether the mobilization board is really the proper sentence to pass on the guilty parties remains to be seen. We might do better to examine the confession itself.

In his July 15 television address, President Carter suggested that the delays and roadblocks encountered by new energy projects have largely been the product of unnecessary "red tape." He gave an emphatic assurance that "we will protect our environment"—evidently with undiminished rigor—but also declared that "when this nation critically needs a refinery or a pipeline, we will build it." Accordingly, the White House proposal states that the energy mobilization board will only be authorized to "eliminate or modify *procedural* impediments" (emphasis added) to the construction of major new energy facilities "without altering substantive Federal, state or local standards."

But where some people see unnecessary red tape, others see essential safeguards against high-handed, reckless, or unaccountable decision-making by government regulators. Procedures, after all, are usually designed to ensure—or to prevent—certain *substantive* outcomes in administrative deliberations. Thus the mobilization board will be authorized to set deadlines for the consideration of new projects by the many agencies charged with monitoring health, safety, and environmental standards and, in certain cases, to order particular streamlined or modified procedures to save time. At the least, this presumes that the board could judge how much consideration was needed in each case better than the specialized monitoring agencies themselves. Is it altogether unreasonable for environmentalists to fear that under modified or accelerated proceedings, reg-



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"Then we're all agreed. As it has always done with its difficulties in the past, America will somehow find a way to solve its energy problems."

ulators would not be able to consider all the safety and environmental risks of a new project as thoroughly as they have been accustomed to do? The Carter administration itself seems to concede something to this concern in explicitly exempting nuclear facilities—where public fears of inadequate regulatory supervision are perhaps at their highest—from the mobilization board's jurisdiction. And yet the delays in securing construction and operating permits have been longer and costlier in the case of nuclear plants than for almost any other type of energy facility.

It might be wiser, after all, for the administration to concede that a speed-up in the development of new energy facilities may require some changes in the substance as well as the procedures of existing regulation. Several congressional versions of the mobilization board proposal would authorize the board to order easing or modification of regulatory standards for particular facilities under certain circumstances. Even the administration's proposal would allow the board to waive regulatory requirements imposed on a new facility after its construction had begun. In failing to extend this authority more broadly, the administration's proposal runs the risk of promoting a larger number of regulatory vetoes than at present: agencies with inadequate time to re-solve all their doubts about a new project may simply decide to prohibit it. But it is not even certain that authority over procedural standards would produce speedier decisions, since it is likely to provoke a good deal of time-consuming litigation challenging mobilization board judgments about the ambiguous line between "procedural" and "substantive" standards. In reducing the scope or modifying the techniques of a mandated environmental impact study in a particular way, for example, would the board have introduced a substantive or a merely procedural change in existing requirements? The courts may be at work for some time resolving questions of that sort.

With sympathy from the courts and the relevant regulatory bodies, however, the energy mobilization board might still accomplish a great deal. And while a reconsideration of overly severe substantive standards might be more generally helpful, it is easy to conceive that, in some areas, a consolidation of the separate proceedings often now required by many different agencies with overlapping jurisdictions would speed project approvals without affecting substantive standards.

However, that still leaves at least one important question to ponder. If such a boon can be achieved at so little cost to regulatory standards, why limit it to only seventy-five new projects at a time, as the administration proposes (or to fewer than twenty-five as several congressional versions provide)? A systematic reorganization of regulatory procedures for energy projects would doubtless take longer than the establishment of an emergency mobilization board—but it would not have to be sustained by the overused rhetoric of an energy "crisis." We might even find it possible, in that case, to bestow this benefit on firms or institutions that claim no energy tie-in, but feel just as oppressed by costly, repetitive regulation.

Letting the Buses Run Free

Although most airlines resisted deregulation—and the trucking industry is now fighting it bitterly—much of the initial impetus for deregulation of intercity busing came from within the industry itself. Trailways has recently backed away from its earlier enthusiasm for deregulation, but given the tendencies already evident in the Carter administration and the Interstate Commerce Commission, the bus industry may still turn out to be the next stop for the deregulation movement.

There are more than 1,000 firms providing intercity passenger bus service in the United States, but Greyhound and Trailways enjoy unchallenged dominance. Greyhound collects about 60 percent of the industry's revenues from scheduled service, Trailways about 20 percent, and the next largest company a mere 2 percent. The distribution of market shares has remained much the same since the 1930s, when Congress gave the ICC responsibility to regulate interstate bus routes and fares. This "freezing" of the industry has been due not only to ICC regulation but also to various state regulatory commissions that have restricted competition in intrastate markets. Indeed, it is the official policy of Arizona, California, and several other states to allow no more than one bus company to serve each intrastate route.

Trailways initiated the current debate over deregulation in an effort to expand its traditional markets. Trailways and the bus industry in general have suffered substantial declines in profitability since the early 1970s. Price increases approved by the federal and state regulators have lagged behind increases in the costs of labor, new buses, and fuel. Furthermore, bus companies have lost passengers to other forms of transportation—to the airlines (whose Super-Saver and other discount fares have actually made it cheaper to fly than ride the bus on some routes), to Amtrak (which gets two-thirds of its revenues from federal subsidy), and to the private automobile. Between 1970 and 1977, passenger-miles on intercity buses grew only 1.5 percent and before-tax profits declined 37 percent (from $89 million on revenues of $901 million to $56 million on revenues of $1,303 million).

Trailways' efforts to expand have been hindered by lack of both route authority and pricing flexibility. Acquiring new interstate or intrastate route authority is a slow and expensive process. Applications are almost invariably contested by carriers already serving those routes and approval, if it comes, is generally preceded by many months or even years of delay. Raising or lowering fares is not much easier. A carrier must give public notice well in advance of any fare change, and the proposal may very well be blocked—or at least delayed—by complaints from rival carriers. Not only may the rival's interest in preserving his profitability be the motivation for a complaint, but it may be the formal basis for the complaint—namely, that a fare reduction will divert so much business as to injure him financially.

Trailways has thus found it extremely difficult to enter new routes now served on a monopoly basis by other carriers or to offer discount fares—in imitation of the airlines—to lure passengers from competing services. The company finally concluded that it would do better to press for systematic relaxation of regulatory constraints than to fight through its numerous new route and fare applications on an exhausting case-by-case basis. In July 1978, it petitioned the ICC to permit bus companies to cut their fares without advance notice and, in the ensuing months, it petitioned the ICC for liberalization rules on fare increases and new route entries. Last November, the company escalated its campaign, when Trailways President J. Kevin Murphy, in a speech to the National Association of Regulatory Utility Commissioners, urged Congress to consider total deregulation of the industry.

Greyhound opposes the "piecemeal deregulation" embodied in Trailways' petitions to the ICC but has supported the concept of total deregulation since last February. Like Trailways, Greyhound has been alarmed by the industry's recent financial decline. However, it is far less interested in expanding its already huge market share than in being free to raise prices and to abandon unprofitable routes. To obtain these freedoms, it is willing to sacrifice the anticompetitive protection that entry controls and price floors provide. But it strenuously opposes the idea of having price floors and entry controls removed while price ceilings and route abandonment controls remain intact.

As with airline deregulation and trucking deregulation, one of the key issues in the busing deregulation debate is that of small-community service. Intercity buses are the principal provider of intercity transportation for rural America, serving 15,000 communities, of which 14,000 have neither air nor train service. Opponents of deregulation argue that deregulation would cause hundreds or even thousands of these small communities to lose their bus service. But supporters respond that existing small-community service is potentially far more profitable than opponents acknowledge and therefore would not be seriously threatened by deregulation. Furthermore, they argue that this service could be maintained more equitably and efficiently through federally or locally funded subsidies paid directly to low-bid contractors than through regulation-enforced cross subsidies.

The other key issue, also reminiscent of airline and trucking deregulation, involves the industry's ability to sustain healthy competition. Deregulation opponents claim that ending controls would enable Greyhound and Trailways to bankrupt or absorb their smaller rivals and that the resulting oligopoly would sooner or later push prices higher. Supporters insist, however, that deregulation would make the industry more competitive and innovative. They point out that, because economies of scale are negligible in the industry and because the investment required to start or expand business are low (a new Greyhound Americruiser costs about $100,000 and a decent used bus about $25,000), small new firms would not necessarily be at a disadvantage. Lacking the protection of entry controls and price floors, any carrier charging excessive prices or providing substandard service would lose business to rivals. Enforcement of existing antitrust laws by the Justice Department should be sufficient to ensure that the industry giants cannot drive out new rivals by taking profits from "monopoly" routes to support below-margin pricing in the newly competitive routes. Thus, even if Greyhound and Trailways increase their market dominance under deregulation, they would risk losing their market power if they abused it.

Trailways, however, has recently begun to have second thoughts about this part of the case for deregulation. This summer, right after the Holiday Inn conglomerate sold the company to independent operators, the new management (which includes several officials previously associated with Greyhound) expressed the view that deregulation was impractical for an industry so dominated by one company. In late August Trailways withdrew its petition for more flexible route entry provisions and subsequently modified the proposals it had submitted to the ICC on fare flexibility.

The ICC is free to put through liberalization measures at its own initiative, however, and with the appointment this summer of three new commissioners known to be sympathetic to the relaxation of motor carrier controls, it may wind up doing precisely that. President Carter, himself, endorsed deregulation of interstate bus operations in his budget message last January. Since then, a task force at the Department of Transportation has been studying the industry and developing legislative proposals, which the administration may submit to Congress this fall. Now that Trailways has reversed its position, Congress is unlikely to show much interest in the issue before the 1980 elections. But if the ICC presses ahead with liberalization measures and gets good results, the groups supporting comprehensive deregulation in Congress can be expected to grow.

Who's in Charge Here?

"Who decides?" may be the central question in evaluating any political or administrative scheme. If so, the Carter administration's Regulatory Analysis Review Group, as well as its regulatory reform bill and most of the parallel bills on regulatory procedure introduced in this session of Congress, all miss the point where federal regulation is concerned. Now the American Bar Association has not only asked the central question but is proposing a decisive answer: at its meeting this summer in New Orleans, the ABA's House of Delegates approved a resolution calling on Congress to pass legislation affirming the President's authority to redirect or, if necessary, overrule the decisions of all regulatory agencies (even the so-called independents) on new regulations.

The ABA's action grew out of a report by its Commission on Law and the Economy, a group of twenty-six lawyers and economists organized by the ABA in 1975 to study ways of improving government regulation. This commission conducted three years of research and investigation (funded with over $500,000 in grants from private foundations and the ABA) before issuing its report last year, entitled *Federal Regulation: Roads to Reform.* The recommendations on presidential authority are contained in a section of the report prepared by the commission's Committee on Regulatory Accountability, chaired by Lloyd Cutler, a prominent Washington attorney who now serves as an advisor to President Carter. Perhaps anticipating that these recommendations were more controversial than those in other sections of the commission's report, the ABA's House of Delegates left them until last, finally endorsing them by a voice vote on July 14.

The ABA's report is hardly the first outside study to call for greater presidential control over the regulatory agencies. As far back as 1937, President Roosevelt's Committee on Administrative Management urged that the independent regulatory agencies be brought under the President's supervision to ensure their accountability to the one political authority elected by the whole nation. Ten years later, the Hoover Commission on Reorganization of the Executive Branch decried the proliferation of independent regulatory bodies as creating a "headless fourth branch of government," not adequately accountable to any elected authority. But Congress, which conferred independent status on these agencies essentially to keep them out of the President's hands, has repeatedly rebelled at proposals to centralize regulatory authority in the White House. In recent years, even the President's authority to control decisions of the other agencies, those formally included in the executive branch, has come under fire in Congress (see "The Politics of RARG," *Regulation*, July/August).

The ABA commission does not take sides in the current legal controversy about the actual scope of presidential authority over executive branch agencies conferred by the Constitution or existing laws. But the commission does make a strong argument, on policy grounds, for enacting a law that clearly establishes the President's ultimate review authority over new federal regulations, regardless of where they originate or how the originating agency is formally classified. The strength of the argument is that it focuses less on the issue of political accountability in the abstract than on the practical problem of coordination or balance among competing regulatory objectives.

The report points out, for example, that regulatory authority over issues bearing directly on the price and availability of energy supply is still scattered among fourteen different agencies, each with its own governing statutes and policy priorities, *in addition to* the array of regulatory authorities sheltered under

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Skating Free. On August 22, the Consumer Products Safety Commission officially rejected a petition to ban skateboards. The petition, filed ten months earlier by the Americans for Democratic Action, claimed that skateboard designs could not be improved to make them safe. In rejecting the petition, the CPSC noted that injuries associated with skateboards had fallen from 140,000 in 1977 to 87,000 in 1978. It also noted that while the declining popularity of the sport may have had something to do with the declining injury rate, wider use of safety precautions may have been a greater factor (spurred, in part perhaps, by a CPSC-supported safety advertising campaign). In this case, safety precautions seem to have been adopted without new regulatory requirements.

A High-Water Mark for Energy Policy. In a July 1979 report to the Council on Environmental Quality, scientists from Woods Hole, Dartmouth, University of California at San Diego, and Scripps make the interesting point that synthetic liquid or gaseous fuels made from coal release, when burned, an average of 1.7 times the amount of carbon dioxide (CO_2) released by the direct burning of oil, coal, or natural gas. CO_2 absorbs infrared radiation, thus producing an increase in the earth's temperature—concentrated, as it happens, in the polar areas. This will melt the polar ice, which (if it occurs on a large enough scale) will in turn raise sea levels worldwide—perhaps by as much as twenty feet, sinking most coastal cities beneath the waves. The authors of the report conclude, mildly enough, that this circumstance "requires consideration of the CO_2 problem as an intrinsic part of any proposed policy on energy."

Sears Still at It. Contrary to earlier press reports—including an "In Brief" item in the July/August *Regulation*—the Equal Employment Opportunity Commission has not taken its charges against Sears, Roebuck and Co. to federal court. The commission did vote in mid-July to authorize its staff to bring suit against Sears for employment discrimination, but staff memos subsequently leaked to the press indicate that at least some members of the staff do not believe the case would stand up in court. Meanwhile, attorneys for the giant retailer say the company will press ahead with the appeal of its own suit against EEOC and nine other federal agencies (a suit dismissed without hearing by the federal district court in Washington last May 15), even if EEOC agrees to take no formal action against Sears.

Helping Hand. The Emergency School Aid Act, designed to assist school districts in bearing the costs of implementing school desegregation plans, also makes grants to local television stations to encourage the "development and production of integrated children's programming of cognitive and effective value." On August 20, the Department of Health, Education, and Welfare announced that, in deciding whether a station should receive a grant, it would consider the extent to which the station employs "minority group persons" in "key creative, administrative and executive decision-making positions." In a published statement, Assistant Secretary Mary Berry denied that the new rule "will lead to the promotion of unqualified people." Rather it "will provide a competitive advantage to proposers who employ qualified minority group members in positions where they may help ensure that the background and culture of minority groups are reflected in ESAA television programs." She did not elaborate.

Bumpers Standards. An amendment to the Administrative Procedure Act, sponsored by Senator Bumpers (Democrat, Arkansas) and nine colleagues, passed the Senate on September 7. It includes the following:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine meaning or applicability of the terms of the agency action. *There shall be no presumption that any rule or regulation of any agency is valid,* and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or any state, the court shall not uphold the validity of any such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown." (Emphasis ours.)

There is good news and bad news. First the good news: this provision would weaken the authority of the agencies to fill in the blanks in broadly worded statutes with their own notions of appropriate policy. Now the bad news: that authority lost by the agencies would be conferred upon the courts.

the new Department of Energy. The coordination problem is particularly acute, according to the report, because most agencies have been given rather specialized functions or responsibilities and each tends to regard its "own mission as having importance at least equal to that of all other government goals." And even with the benefit of extensive interagency consultations (which the commission also recommends in its report), single-mission agencies are poorly equipped to make major balancing judgments among competing national policies —when the goal of curbing pollution, for example, conflicts with the goal of curbing inflation or of stimulating domestic energy production. In cases like these, "only elected officials and their immediate staffs can provide the requisite overview and coordination, make practical political judgments that weigh competing claims and stand accountable at the polls for the results." The report argues that Congress "cannot perform these tasks by legislating the details of one regulatory decision after another"—if it could, it would not have "delegated power to the agencies in the first place"—so the initiative must fall to the President.

Specifically, the commission proposes a general statute authorizing the President

> (a) to direct any regulatory agency to take up, decide, or reconsider a critical regulatory issue within a specified period of time, and (b) thereafter to modify or reverse an agency policy, rule, regulation or decision relating to such an issue.

The statute would exempt from this authority agency "adjudications," such as issuance or revocation of licenses to particular firms or the issuance of "cease and desist" orders or penalties in the enforcement of existing regulations. It would also exempt the money market functions of the Federal Reserve Board, the campaign financing functions of the Federal Election Commission, and a few noneconomic regulatory issues on which there is "still a broad consensus that they are better left entirely in independent hands" (the fairness doctrines of the Federal Communications Commission being the only example cited). The ABA's proposal would not empower the President to direct an agency to do anything that it would not otherwise be authorized to do and would afford judicial review of all such presidential orders.

The ABA proposal incorporates numerous procedural safeguards. It would require the President to publish in the *Federal Register* advance notice of his intention to issue any order of this kind, to allow a thirty-day public comment period on the proposed order and then, if the order is adopted, to publish along with it the factual findings and policy considerations underlying it. Finally, though the commission expresses doubts about the constitutional propriety of a legislative veto, it urges that such presidential orders to the regulatory commissions not take effect until seventy days after their promulgation. This would give Congress time to overrule the President's decision by legislation—or the President an opportunity to modify or withdraw an order that meets with a particularly hostile congressional reception. The commission also recommends that the legislation granting these powers to the President be limited to a specified term, so that Congress could refuse to renew it if it decided the new powers were being widely abused.

Even with these safeguards, the ABA proposal is sweeping in its implications and sure to raise hackles in many quarters. Several members of the ABA commission itself warned

- that the proposal could "politicize agency decision-making" (though the proponents would presumably reply that the priority decisions to be made are inherently political);
- that it would replace careful administrative judgments with the assessments of uninformed and inexperienced White House staffers (an argument that would have more force if, under the proposed statutory scheme, the President's personal responsibility were not so visible that his concern for political self-preservation would lead him to consult all knowledgeable sources, including the expert agencies); and
- that the proposal would usurp the rightful authority of Congress to establish priorities among competing national policies—an objection that is sure to be echoed in Congress itself (though it can be answered with the claim that congressional failure to exercise such authority in the past is precisely what renders the scheme necessary and that the seventy-day waiting period provides ample time for Congress to block presidential initiatives in this area it does not like).

At any event, it is not clear that any President would really welcome such comprehensive responsibility for the management of regulatory affairs. It may be significant in this connection that the White House has not yet responded publicly to the ABA proposal. Thus while the main elements of the proposal have recently been incorporated in a bill by Senator William Roth (Republican, Delaware), its fate remains most uncertain. At the least, though, the ABA's recommendations should help to focus the debate on regulatory reform on one of the central issues of regulatory management.