Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

White House Oversight

TO THE EDITOR:

George Eads ("Harnessing Regulation: The Evolving Role of White House Oversight," *Regulation*, May/June 1981) thoughtfully raises several issues concerning the Task Force on Regulatory Relief and President Reagan's Executive Order 12291. Eads correctly perceives the paradox of giving new substantive and oversight responsibilities to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) while limiting its staff resources and leaving the incentives of the agencies unchanged. Eads also claims that there may be less chance for public participation under the new executive order. I disagree with the latter observation; in addition, I believe the executive order is already having some salutary effects not discussed in Eads's article.

The executive order has caused all parties involved in regulatory decisions to sharpen their data bases, analytic tools, documentation, and presentations. Hundreds of parties with new or reawakened interest in the regulatory process have responded to the task force's request for information. During this "phase-in" period there has been *more* public participation, not less; it is more broadly based and seems to be more open; furthermore, some responses, while not presenting complete benefit-cost analyses, have provided agencies with helpful insights in specific substantive areas. Industry frequently possesses much of the data base needed for regulatory analysis, some of which it considers proprietary and thus would not normally volunteer. . . .

Wilbur A. Steger,
CONSAD Research Corporation

TO THE EDITOR:

Many of the changes made by the new executive order were either implicit in the Carter approach or are attempts to improve on the deficiencies of that system. Carter splintered regulatory oversight among many groups, so that no central entity could develop a regulatory policy to guide individual agency decisions. The new Office of Information and Regulatory Affairs at least has the *capability* to do so; moreover, the mere existence of a single office makes possible an accountability that was necessarily absent under the former approach. If problems do develop, as Eads fears, the political system will know precisely where to look to take corrective action.

Nor is there any particular reason to think that OIRA is about to collapse of its own weight. Eliminating the redundancies and conflicts of the earlier decentralized approach will save needed resources. The new functions, such as assessing alternative regulatory approaches under the Regulatory Flexibility Act, are closely aligned with existing ones and will not impose significant new staffing burdens.

The White House will, as before, depend on the agencies for analysis. Unlike before, however, OIRA will request interested parties to bring regulatory matters to its attention. It is hard to see how, as alleged, this will make the White House less able to keep track of regulatory problems. OMB will not just appraise agencies' regulatory analyses—which was RARG's chief power—but will also have the power to request additional work after quickly assessing the quality of analysis, thus reducing the need for long, time-consuming analyses in the first place except in the truly significant cases. As a result, the analytical burden should not increase as much as Eads appears to think.

The real concern of OIRA's critics appears to be that it intends to take its charge seriously and pursue regulatory oversight aggressively. While that may be taxing at times, it is certainly welcome. During the Carter administration, there was a widespread feeling that agencies regularly evaded their responsibility to carry out regulatory analysis by fraudulently finding that a regulation was not "major." If the agency did analyze the regulation and did a bad job of it, CWPS and RARG could comment on the sloppiness but were powerless to go much beyond that. And the Carter White House's signals were so ambivalent that agencies simply ignored analytical principles as they pursued their more parochial goals. When the showdown came on cotton dust, OSHA won and the lesson was clear.

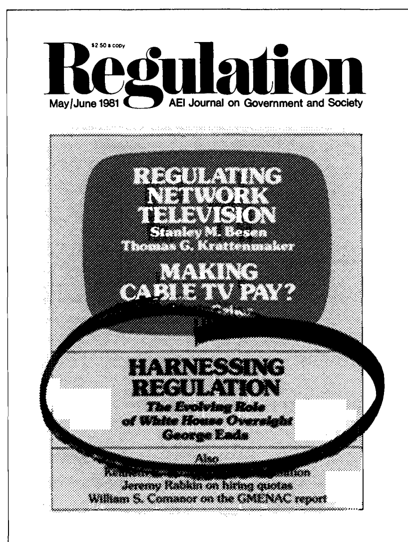
Indeed, the very examples Eads uses to show creative use of White House oversight were battles that were *lost*. Moreover, in its last year, just when one would have thought its processes were maturing, RARG did not seem terribly active. Nor did any significant regulatory policy emerge in the difficult area of health and safety regulation. In short, it was easy to dismiss the Carter oversight process as ineffective.

The cost-benefit provision of the Reagan executive order differs more in emphasis than in kind from the Carter procedures. The latter directed the agencies to consider costs and benefits, quantify them, and then choose the least burdensome approach or explain in detail why it was rejected. Since that explanation would have to be extremely cogent to persuade a court that the rejection of the low-cost approach was not arbitrary or capricious, the theory of the Carter executive order was simply to use normal judicial review to force agencies to act cost-effectively. While the Carter administration "took pains to stress that its requirements should not be interpreted as subjecting rules to a 'cost-benefit test,'" the disclaimer seems more politically motivated than factually accurate.

I concur fully and heartily with two of Eads's major points. First, there seems to be too much emphasis on formal quantification of costs and benefits. Not only may such an effort be difficult and sometimes highly misleading, but it is also frequently not a cost-effective

use of resources. The system should permit more flexibility and judgment. Second, since the first line of defense will always be the agencies, it is essential to encourage the development of sound regulatory proposals in the first instance. If, as Eads fears, OIRA becomes a clumsy, ax-wielding Queen of Hearts, good people will shun the agencies and everyone will lose—regulator and reformer alike. My hope is that individuals who are particularly well qualified to participate in regulatory decisions will now be taken more seriously in their agencies and hence be attracted to responsible positions. The test will be whether OIRA, as it shifts from the frenzy of getting things started to a normal operating mode, establishes good working relations with the agencies, or turns instead to an adversarial, anti-regulation stance. . . .

Philip J. Harter,
Kator, Scott, Harter & Heller



GEORGE EADS responds:

Philip Harter and I have very different views about what constitutes effective regulatory oversight. He places great faith in *form*: in clean organization charts, clear lines of authority, the ability of the oversight agency to demonstrate "wins." In his view, since the Carter process was organizationally "messy," since it never developed a clearly enunciated statement of "regulatory policy," and since those in the White House sometimes "lost" conspicuously, it was "ineffective."

His belief in the power of form is misplaced. There have been too many recent instances—energy comes immediately to mind—where the "solution" to a complex policy problem has been seen as principally organizational. The establishment of a centralized office with authority to review regulations does not, by itself, create the capability to develop and implement sensible regulatory policy. Such a capability only results from a proper matching of power with the ability to exercise it responsibly.

While the verdict is still out on the Reagan program, nothing that has occurred since I wrote my article calms the fears I expressed in it. Indeed, recent events suggest that I probably took far too optimistic a tone. As time has passed, OIRA's attention has increasingly focused on generating regulatory "body counts." OIRA staffers occupy their time "reviewing" (reading?) hundreds of petty regulations, 95 percent of which they declare to be "consistent with the President's program"—whatever that means. Meanwhile, original analysis by the White House staff has virtually ceased, and the backlog of issues raised by analyses performed by previous administrations is not being replenished. Agency analytical capabilities, crucial to the long-run success of any regulatory oversight process, are rapidly being dismantled. The word is being spread throughout the business community: "Forget analysis—it doesn't matter."

All of which makes the point raised by Wilbur Steger the more incredible. He refers to "hundreds of parties with new or reawakened interest in the regulatory process" who have responded to the vice-president's request for information, arguing that this has caused "all parties involved in regulatory decisions to sharpen their data bases, analytic tools, documentation, and presentations." He may be correct on the last point—presentations may have improved. But, by and large, these "wish lists" of regulations that one or another special interest wants to eliminate bear no more relationship to serious analysis than the wish lists we constantly received when I was in the White House. To refer to the process that produced these lists—and that has caused them to be uncritically forwarded to the agencies—as "public participation" is to debase the term.

Don't misunderstand me. Such lists can—and sometimes do—provide useful input for White House staffers seeking to oversee regulation. (I wish I had a dollar for every one we received.) But they should be carefully checked to determine whether their claims have merit. This requires the sort of independent analytical capability so sorely missing in the Reagan White House.

The Reagan oversight program deserves a chance to prove itself. And the Carter program certainly was far from perfect. But to be effective over the long pull, any oversight process must build capability, not destroy it. Unfortunately, thus far the Reagan process has demonstrated itself capable only of the latter. Those who run it would do well to recognize that its true test will be the staying power of the institutions it leaves behind. For regulation is not going to disappear.

Contrary to Harter's assertion, my fear is not that the Reagan process will succeed, but that it will fail, and do so in a way that confirms the worst fears of those who stress the dangers of White House oversight of regulation. That would be a tragedy.

Cable TV and Copyright Law

TO THE EDITOR:

In his argument for "true deregulation" of cable copyright ("Making Cable TV Pay? The Copyright Controversy," *Regulation,* May/June), Henry Geller calls for doing away with compulsory license and the Copyright Royalty Tribunal, and instead imposing full copyright liability on all cable systems operating in the 100 largest markets (while exempting all systems in smaller markets). He believes that eliminating the "cumbersome and impractical" CRT process would leave the pricing of copyrighted programs to the marketplace.

Now that the courts have upheld the Federal Communications Commission's repeal of its former restrictions on cable transmission, the Copyright Act of 1976, which did in fact contemplate the FCC's change in its rules, has a chance to work. It has been effective, and there is no reason why it should not be allowed to continue.

But Geller gives short shrift to one reason the compulsory license works: it eliminates the need for every cable system to negotiate with every copyright owner whose programming is to be retransmitted. Consider the burden involved in requiring more than 4,300 cable systems to negotiate individually for programming with hundreds, perhaps thousands, of copyright own-

ers. The paperwork and manpower expended would be extraordinary and very costly.

Despite claims to the contrary, the marketplace has adapted to the compulsory license. The program supply industry has been unable or unwilling to quantify the impact of cable on program values, probably because of its relative insignificance.

Another indication that the marketplace has adjusted to compulsory license is the acceptance of superstations by the program supply industry. Program suppliers can refrain from selling to superstations to avoid widespread cable distribution. When WTBS in Atlanta emerged as a superstation in 1977, all but one of the major program syndicators refused to sell to that station. Now, however, all but one of the major syndicated program companies have sold programs to WTBS, and the last holdout has been negotiating with the superstation. Program suppliers have raised rates for programs sold to WTBS to reflect increased cable audience coverage, an example of the flexibility of the 1976 act.

We should not overlook the value of the compulsory license in serving the public interest. Three-quarters of the television markets in the United States, serving 35 percent of the television population, have no non-network TV stations. Cable helps balance this disparity by providing non-network programming outside big cities. Cable increases the public's viewing options. It is not asking too much for broadcasters and program producers to trade off just a little of the advantage they reap from the system to serve the public's interest in diverse programming.

Thomas E. Wheeler,
National Cable Television Association

TO THE EDITOR:

One thing can be said about Henry Geller—he is persistent. Unfortunately, persistence in the pursuit of poor policy is no virtue. His proposal to require retransmission consent is Harold Stassen-esque in its appeal and in its recurrence. Merely repeating it over and over again, as he has done since the 1960s, does not cure its fatal policy flaws.

First, Geller assumes that, in a perfect market, cable systems would pay the same for the programming of a distant signal as broadcasters pay for their syndicated programming. He speaks of the differing percentage of their revenue that cable operators and broadcasters pay for non-network distant signal programming (1 percent and 30 percent respectively) as if this were a logical comparison. In fact, this is comparing apples and oranges. Cable has many channels (up to a hundred) to program. Distant signals may fill at most five or ten. The rest are filled with local broadcast channels exempt from copyright and gladly donated by local broadcasters, original programming produced by the cable system or local citizens (where the cable system is normally the copyright holder), and pay programming (like Home Box Office), which is subject to full copyright liability and for which cable bargains in the market.

Distant signals are, in short, only one small part of a cable operator's overall expense and generate only a part of a cable system's revenues. When all programming costs for larger cable systems are combined, they often claim 30 to 40 percent of gross revenues, a figure roughly equal to or more than the amount paid for programming by broadcasters.

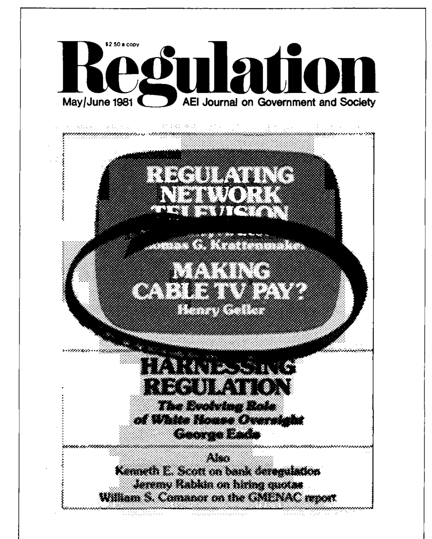
Another difference is that a broadcaster may capture up to a third of the audience in its city with its programming, while distant signals are watched by smaller portions of the cable audience, especially on multichannel systems. Some people may find the distant channel a compelling reason to subscribe to cable, justifying its carriage to the cable operator. But a straight comparison between a broadcaster's and a cable system's costs for that programming ignores the very different role that programming plays to each medium.

Second, Geller dismisses, but does not analyze, the importance of the FCC's extensive studies on the impact of the cable rules formerly restricting the number and content of distant signals a cable system could carry. The study prompting the FCC's recent deregulatory moves showed that local broadcasters and program producers would experience negligible impact as a result. People continue, by and large, to watch local stations even if they also watch distant stations. If audiences are not diverted by cable, local broadcast stations will continue to attract advertisers and revenues. Producers will continue to receive the same amount of income from syndicated programs.

In short, the FCC's studies showed that removing these outmoded rules would have no adverse effect on the program market. Geller has never been able to contradict this simple and compelling fact. . . .

The distant signal program market is only now beginning to evolve. The compulsory license is an essential element in its evolution. With Geller's system, this evolution would come to a screaming halt—as would, in many cases, the growth of the cable industry itself. To say that would be an unfortunate result may seem simplistic. But, unlike Geller's retransmission consent idea, it bears repeating.

Charles D. Ferris,
Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C.



HENRY GELLER responds:

I argued for adopting full copyright liability in the major markets while "grandfathering" cable operations in the smaller markets where change would be too disruptive and where there is, in any event, comparatively little revenue to programmers. In doing so, I made two main points:

(1) Cable, and it alone, is skewing the TV programming market by having the government intervene with a compulsory license and fee schedule.

(2) Such intervention is wholly unnecessary in light of the plethora of programming, both pay- and advertiser-supported, now available through satellite services.

Wheeler and Ferris ignore these points. They tacitly concede, therefore, that cable *is* skewing the market, when it could instead rely on satellite programming.

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Wheeler asks how every cable system could negotiate with every copyright owner for programming rights. How does cable now get the right to present over forty satellite services? Middlemen like HBO, ABC, and Hearst do the job. The real question, which Wheeler will not face and cannot answer, is: in light of the forty satellite services available in the market, why should the government intervene to give cable systems (owned by such "Mom and Pop" outfits as Time-Life, Westinghouse-Teleprompter, and Times Mirror) distant broadcast signals at a government-set, bargain-basement fee?

Wheeler argues that the compulsory license brings non-network programming to communities that would otherwise lack it. That is one reason why cable in the small community should be grandfathered. But surely Wheeler is not arguing that the top fifty markets, with 67 percent of all television households, lack independents.

Ferris argues that the compulsory license is working and that economic studies show no adverse effect on the programmer. The present system is *not* working: sports interests complain bitterly that if they offer an event to one station in one area, it can be shown on cable anywhere, ignoring the wishes of the league or entrepreneur.

Ferris is right to say that I dismiss his cockamamie economic study. I put a question to him, and do so again in vain hope of an answer: If RCA and other videodisc manufacturers asked for compulsory license to use any films they pleased, and had a study done showing "no adverse effects" along with great benefits to, say, rural America, what would he do? And after videodiscs, what would he do when other media came forward with "studies" and requests for government intervention?

It is sad, really, to see these arguments come from Wheeler and Ferris. Wheeler's cable associates were once themselves the victims of market skewing—the pay-TV rules that the FCC adopted to protect broadcasting. Cable had many allies, myself included, in the fight to get rid of these protectionist rules. Now it is cable's turn to skew the market for unfair advantage. The victim has become the victimizer. Ferris, as chairman of the FCC, trumpeted the virtues of the marketplace and deregulation. Now he urges that a government agency, the Copyright Royalty Tribunal, set and adjust the rates cable is to pay for this programming. Some marketplace! Some deregulation!

My original title was "To Market, To Market Goes the Cable Pig." It may have been too long to fit *Regulation's* cover, but, most unfortunately, it does fit cable.

Affirmative Action for Federal Contractors

TO THE EDITOR:

I hope Jeremy Rabkin ("The Stroke of a Pen," *Regulation*, May/June) is not too disappointed. His article urged the Reagan administration to eliminate, with "the stroke of a pen," the federal government's entire program to encourage the hiring of women and minorities by federal contractors.

Unfortunately for Rabkin, but also unfortunately for many classes of workers still facing employment discrimination in this country, the President's pen subsequently struck through only certain key components of the affirmative action program. Proposed new regulations from the Labor Department's Office of Federal Contract Compliance would exempt all but the largest federal contractors from affirmative action requirements, and would weaken hiring, promoting, and reporting requirements for those remaining.

With a jackhammer repetition of the "quota" buzzword, Rabkin's article drummed up the familiar arguments against government efforts to advance minorities and women into careers that have traditionally been reserved for white men. He could apparently discern no difference between "quotas," which establish an inflexible ceiling for applicants, and "goals," which seek to create a floor for those who have been held down by discriminatory attitudes among employers.

Nobody, I am sure, wants to mandate a ceiling to hold down career advancement. Everybody, I hope, would support a floor to further the attainment of equality of opportunity in our society.

Such floors, or goals, are embodied in the language and the intent of the existing Labor Department regulations. It is ironic that, as these regulations are being effectively enforced, and as increasing numbers of women and minorities are finding employment for the first time in various skilled and professional occupations, a major rollback is being proposed. This is not fair to the victims of continuing employment discrimination. Nor is it fair to the taxpayers whose money would flow to federal contractors hiring and promoting only white males.

Nowhere did I read in Rabkin's article any serious suggestions for bringing equal access to America's work places. It has been obvious since before the Civil War that racism and sexism will not fade away of their own accord. Until someone can bring forward a better alternative, we should stay with the affirmative action plan that is in place and is working.

Shirley Chisholm,
U.S. Representative,
Twelfth Congressional District,
New York

JEREMY RABKIN responds:

Congresswoman Chisholm seems to find something unsporting in my repeated use of the term "quota." Evidently she would prefer that affirmative action policies be described with soothing euphemisms. She would like us to think of affirmative action "goals" as merely a "floor" for some groups—and ignore the plain fact that a floor for some is necessarily a ceiling for others. The congresswoman sees all too well that racial quotas, when honestly acknowledged as such, are repellent to the overwhelming majority of Americans of every personal background.

Quota advocates like Chisholm would have us believe that a spoils system of job allocations by race and sex is the only alternative to passive acceptance of discrimination. I think it is precisely the historic challenge of the Reagan administration to make clear that enforcement of equal opportunity—the right to be considered on one's own merits, regardless of race or sex—is still a realistic alternative, in itself, and in the long run the only workable alternative for a free country. By contenting itself with a few alterations in the enforcement machinery of the contract compliance program, the administration opens itself to the charge of being only half-heartedly for equal opportunity, when it might, by abolishing the quota system, stand forth as its truest champion. Worse, the present course opens the administration to the charge of caring more about the burdens affirmative action imposes on the nation's economy than the burdens it leaves on the nation's soul. ■