
An Ambiguous Beginning

Will Carter Put Out the Fire?

David R. Gergen

AT A SEMINAR in Washington this summer, a young lady arose to challenge the attorney general of the United States. "If you believe in free markets, as you say, Mr. Attorney General, how can you justify the fact that the government now regulates so much of our society and intervenes so heavily in our personal lives?"

"Well," replied Griffin Bell, "the President and I both like to answer that by recalling what a man said after he had been charged with public drunkenness and setting his bed on fire. 'Your honor,' he said, 'I plead guilty to being drunk the other night, but the bed was on fire when I got into it.'"¹

Bell had a telling point. For those who believe that the government excessively interferes in private decision-making, the problem flared up long before the Carter team came to Washington, and no one in the new crowd can reasonably be expected to bear the blame.

Yet, six months after its arrival, there is mounting evidence that the Carter administration is having considerable difficulty of its own in damping the fires of governmental regulation. It has hauled out all the engine companies with a great clanging of bells, and in some areas it has indeed made progress. But in others it only seems to be fanning the flames.

Just as the Ford administration learned to its chagrin, the Carter administration is also

coming hard up against the fact that regulatory growth has achieved a momentum of its own that even the most ardent anti-regulators have trouble in stemming. Because of statutes already on the books and the mentality that seizes federal agencies, government regulations have become like government expenditures: many of them are now "uncontrollable." As one of the leaders in regulatory reform under the Ford administration puts it: "We've reached the point where it is unrealistic to think that a President can simply roll back the tide of regulations that has swept over us. The most we can hope for now is to prevent a surge of new ones, and even that is going to take extremely dedicated, persistent leadership from the White House."²

Jimmy Carter never tried to convert regulatory reform into a major campaign issue in the same way as Gerald Ford, but since coming into office, he has often spoken of his commitment to reducing regulations. In a message to Congress on March 4, for instance, Carter said: "One of my Administration's major goals is to free the American people from the burden of overregulation. We must look, industry by industry, at what effect regulation has — whether it protects the public interest or whether it simply blunts the healthy forces of competition, inflates prices and discourages business innovation. Whenever it seems likely that the free market would better serve the public, we will eliminate government regulation."

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¹Statement made at a private seminar in Washington, D.C., this summer.

²This quotation and others where the speaker is not identified come from officials who wished to remain anonymous.

Matching Rhetoric and Reality

The President's difficulties in squaring rhetoric with the reality are illustrated by the pledges he made in his first fireside chat to the nation less than two weeks after taking office. To lessen the burden of governmental regulations, Carter promised that (1) every new regulation would be read by a Cabinet officer before it was issued, (2) the number and length of regulations would be cut, (3) regulations would be written "in plain English for a change," and (4) every new regulation would be signed by its author.

Promise number one sent snickers through the bureaucracy. As one reporter said in the *Washington Post*, keeping that promise would mean that Joseph Califano, secretary of the Department of Health, Education, and Welfare, would have to read the equivalent of *War and Peace* once or twice a week. Or Secretary Brock Adams at Transportation would have to stack his bedside reading table with 680 single-spaced pages of the latest missive on airline safety. Within a few weeks, the White House realized that the rule was being honored mostly in the breach and it quietly rescinded the order.

Promise number two seems to be suffering the same fate. During the first six months of calendar year 1977, some 33,704 pages of newly proposed rules and regulations were printed in the *Federal Register*, setting a new record and exceeding the previous year by a full 25 percent.

Carter's third promise—to render new regulations in plainer English—has met with more success. Before the President's fireside speech, the director of the *Federal Register*, Fred J. Emery, had started a monthly four-day seminar in regulation writing and had decreed that all new regulations contain a simplified preamble explaining the purpose of the regulation, but neither move had captured great attention. Since the President's speech, however, enrollment at Emery's classes has more than doubled and waiting lines have developed through November.

As for the promise to have the author of the regulation publicly attach his name to the document, it was quickly recognized that new regulations are frequently the product of many hands. Instead of arbitrarily assigning responsibility, the *Register* has begun to include in

each new regulation the name and address of a single individual in an agency who can be contacted for further information. In some cases, agencies also voluntarily add the name of the drafter.

Thus, of the four changes that the President tried to make in January, one is being faithfully pursued, one has been watered down, and two have been frustrated. Is that success or failure? Much probably lies in the eyes of the beholder.

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Indeed, looking at the entire record of the Carter administration during its first six months, it is possible to read two widely differing interpretations into its commitment and progress on regulatory reform. Those who choose to do so can conclude from his rhetoric and actions that the President is a determined, dedicated reformer. But others can just as easily reach the opposite conclusion.

The truth seems to be that the President is personally committed to regulatory reform and to free markets but is willing to steer a jagged course, making exceptions wherever a reasonable case can be made for greater governmental control. As time passes, the administration also seems to be less and less interested in eliminating regulations per se and more and more concerned with the efficiency, effectiveness, and fairness of the regulatory system.

Carter as Pro-Regulator

For detractors, the most obvious source of dismay is that the Carter administration has put forth proposals in several areas that would require sweeping new federal regulations and

controls. In his first six months in office, the President personally proposed or supported the following:

- Massive new controls over the production, pricing, and consumption of energy;
- New controls over hospital costs, with a suggestion by Secretary Califano that controls over physicians' fees may also be in the offing;
- Tougher regulations for toxic chemicals, water quality standards, and occupational health hazards;
- Creation of an agency for consumer protection that would have no rulemaking authority of its own but would assuredly become a potent force for new regulations in other agencies;
- Increasing federal intervention in agricultural markets to ensure higher prices for farmers and stabilize international trade in several key commodities;
- New controls over tankers to reduce the threat of oil spills; and
- Passage of cargo preference legislation that would initially require 4.5 percent of all oil imports to be carried in U.S.-flag tankers, with the percentage rising to 9.5 in five years.

"There are some areas of national life where the public interest is so critical that it overcomes any bias against governmental intervention," explains one administration official. "Energy is a prime example. In the last Administration there was a lot of anti-regulation talk about energy, but in the crunch, Ford signed an energy bill that contained many new controls. Carter has been forced to bite the same bullet, and we're not afraid to admit it."

Beyond the specific legislative changes he has supported, the President has also made several high-level appointments that suggest a tightening of the regulatory apparatus. Michael Pertschuk, the new chairman of the Federal Trade Commission (FTC) was former chief counsel for the Senate Commerce Committee where he helped to father the Consumer Product Safety Commission and laws strengthening federal power over trade. Pertschuk has been publicly quoted as saying that businessmen have "every reason to fear us." The new head of the highway safety program in Washington, Joan Claybrook, used to run Ralph Nader's Congress Watch and was a vocal proponent of auto airbags. The new head of the Occupational Safety and Health Administration (OSHA), Eula Bingham, was recommended to

the administration by the AFL-CIO and once chaired the OSHA committee that produced controversial new emission standards for coke ovens. At the Federal Energy Administration, John O'Leary and several of his aides have long been identified with more controls over energy. And at the Transportation Department, Secretary Adams forthrightly opposed deregulation while serving in Congress.

A third factor cited by detractors—and one recognized in some parts of the administration—is the Carterites' continuing inability to follow through on their own best intentions.

In the early days of the administration, a general paper on deregulation was prepared for the President, and it was sent in to him along with a recent *Fortune* article by Paul Weaver suggesting that the time was right for reform in several critical areas. The President sent out a note saying that he would like to have a comprehensive regulatory message prepared for transmission to the Congress. But that has never happened. Instead, the general paper has bounced around from office to office over several months, and policy has continued to be made on an ad hoc basis. In fact, the administration has yet to submit to the Congress a single legislative proposal of its own for substantive overhaul of the regulatory process; all of its pronouncements have been endorsements or general outlines of desired changes.

"There's no question that many people here share a sense of disappointment about our progress during the first six months," says one ranking administration aide. "The President definitely wants to cut back on regulation and harrassment. He wants to promote competition. But our efforts to reach those goals have been hampered by the initial problems of settling in and then by the uncertainty over how the White House and executive office would be reorganized."

Another problem that has slowed the pace of reform efforts, according to some insiders, is that the President has neither a chief of staff nor a high-level coordinator to push for sustained action from within. As a result, reform proposals are often given enthusiastic support by individual members of the administration, but no one has the cachet to guide them through the bureaucracy. In the past administration, Roderick Hills first assumed that role and then, after he was named chairman of the Securities and Exchange Commis-

sion, Deputy Counsel to the President Edward Schmults became the point man for reform, working closely with one of the President's chief economic advisers, Paul MacAvoy.

Carter as Anti-Regulator

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First, President Carter tentatively approved and the Office of Management and Budget (OMB) then sent to agency and department heads a proposed set of guidelines to govern the way that they draft and issue regulations. Underlying the guidelines is the view that regulations are too often written from a narrow agency perspective, failing to take into account broad, general policy needs or their full economic impact. The guidelines suggest that policy oversight and economic analysis ought to be introduced into the process from its inception, not after the regulations are formally proposed. The guidelines also call for "sunset review" of old regulations.³ Later this fall, after agency comments on the proposed guidelines have been received and studied, the President's advisers hope to reissue final guidelines in the form of an executive order. Second, the OMB began moving in August toward the formation of a new division that would have specific oversight responsibility for the government's regulatory process. Wayne G. Granquist, a political appointee, is to become the OMB associate director for management and regulatory policy, while Stanley E. Morris, a career civil servant and veteran of regulatory reform, is to become deputy associate director

of the Regulatory Policy and Reports Management Division.

In the eyes of many Carterites who have been tilling the regulatory vineyards since January, the guidelines and restructuring of OMB are welcome steps forward but instead of representing breakthroughs—as some believe—they are just two more gains along a steady continuum. In their view, the administration had already built a solid record of achievement long before August. Among the reforms they cite:

- In May, the President urged passage of "ethics in government" legislation that would strengthen the requirements for financial disclosure by officials of the executive branch and would broaden the ban against contacts with a government agency or department that an official has just left.

- This summer, the administration endorsed S. 600, a regulatory reform bill sponsored by Senators Robert Byrd, Charles Percy and Abraham Ribicoff that would require both the executive and legislative branches to conduct a systematic examination of all regulatory activities over the next eight years.

- The administration is also supporting sunset legislation that would require most federal programs to undergo periodic review, a measure thought to complement Carter's zero-based budgetry.

- In a series of meetings early in his administration, Carter asked university presidents, state school superintendents, manufacturers, and others to keep him posted on federal paperwork and regulatory requirements they found to be unnecessary and obnoxious.

- The administration has also been working to eliminate overlapping, contradictory edicts from Washington. In May, for instance, three different agencies—the Food and Drug Administration (FDA), the Consumer Products Safety Commission, and the Environmental Protection Agency (EPA)—joined to impose a ban on fluorocarbons with a single timetable. Douglas M. Costle, EPA head, and Eula Bingham of OSHA have both promised they will synchronize their efforts on other projects in the future, such as a study of benzene.

³Sunset review is a relatively new concept in government. As used here, it means essentially that an agency would be required to review its regulations periodically. The "sun would set" on any regulation that the agency did not reauthorize by a preestablished time.

- Under the leadership of Charles Schultze, the administration is trying to continue the efforts of the Ford White House to force agencies into evaluating economic costs before issuing a new regulation (see article by James C. Miller in the July/August issue of *Regulation*). Carter has endorsed the project, but as of early August, it was still in the idea stage.

- Finally, the administration is studying the idea, articulated by Schultze in his Godkin Lectures (see page 10, this issue), of substituting economic incentives and disincentives for prescriptive rulemaking as a better way to reach regulatory objectives. In May, Schultze, Bert Lance of OMB, and Stuart Eizenstat sent a memorandum to the President suggesting that expanded workers' compensation—or an “injury rate tax”—might be a better way to reduce industrial accidents than comprehensive federal standards. More recently, Lance and Labor Secretary Ray Marshall have set up a high-level task force to review the entire area of industrial health and safety. The idea could possibly be derailed before it is effectively launched: shortly after word of the task force reached the press, organized labor and at least one powerful senator sent blistering objections to the White House, warning that the contemplated charges could dilute the power of OSHA.

Overview of Other Actions

In addition to the initiatives noted above, the first six months of the Carter presidency have also brought many developments—some favoring less, others favoring more regulation—within several major policy areas. Here is a brief summary of highlights:

Transportation. Carter took office at a propitious moment for reform of airline regulations. Senators Edward Kennedy and Howard W. Cannon had already held extensive hearings on the issue and had developed their own legislation; President Ford had also submitted reform legislation; and the press had begun to give the matter favorable attention. Carter chose to move swiftly, and on March 4 he sent a message to Congress endorsing the Kennedy-Cannon effort to relax the CAB's authority over routes and fares for interstate domestic airlines. Transportation Secretary Brock Adams, long a proponent of stiff regulation, testified

only half-heartedly in favor of the President's position, but in recent weeks has swung behind it. Although industry and labor opposition continues to be intense, and the bill has been slowed in Congress, the administration is still optimistic about Senate passage this fall and House action in 1977.

In the meantime, there are growing doubts about the administration's plans on trucking deregulation. In his town meeting in Clinton, Massachusetts, in February, Carter promised that a staff review of trucking would be completed within a few weeks, and expectations grew that the administration would submit legislation in the spring. When a bill failed to materialize, the official explanation was that the administration wanted to await completion of congressional action on airline deregulation; one unofficial explanation was that the trucking industry began applying heavy pressure against reforms even before Air Force One returned from Clinton. Now, the latest word is that Secretary Adams has been so impressed with the commitment to trucking reforms of A. Daniel O'Neal, the new chairman of the Interstate Commerce Commission, that he wants to leave the reform effort in the hands of the ICC (see “ICC Staff Task Force Report,” page 41, of this issue).

Occupational safety and health. OSHA won widespread public support this spring when it announced that henceforth it would concentrate only on major, serious health hazards, leaving aside the minor investigations that have irritated people as divergent as Billy Carter and the groundskeepers of the U.S. Capitol. The end has come to “Mickey Mouse” regulations, announced Secretary Marshall; whether he holds to that pledge remains to be seen.

Environmental protection. A new surge of environmental restrictions seems inevitable during the Carter years. His own environmental message to the Congress, supporting tougher standards for industrial discharges of toxic chemicals, water quality, and occupational hazards, points conclusively in that direction. The President also signed a strip-mining bill that Ford twice vetoed, and he permitted the auto industry only a one-year delay on tougher air standards (they had wanted three years). In addition, the Carter administration will be responsible for implementing the Toxic Substances Control Act of 1976, which

requires the government to regulate more than 30,000 chemicals. It is estimated that more than 7,000 civil servants may be needed to enforce the law. Early skirmishes have already suggested to private companies that the administration plans to be tough in its new regulations.

Consumer protection. Early signs indicate that the Carter administration may also create stiffer rules and regulations in the consumer field. In addition to his support for the consumer protection agency, the President has named two "activists" to head up the FTC and the FDA.

At the FTC, Michael Pertschuk sent ripples through the advertising world early this summer with reports that he might seek to regulate advertising that the government considers "unfair," as opposed to past government bans against advertising that is "untrue." His theory apparently is that some advertising promotes habits that contravene the national interest—for example, car ads that encourage more driving or children's ads that whet materialistic instincts—and the government ought to put an end to it. The FTC has another struggle on its hands with the tobacco industry over cigarette advertising; that fight extends back into earlier years but it heated up this spring. Not unmindful of critics that its recent activism has created a spate of new problems in the private sector, the FTC is also engaged in an internal effort to evaluate its own consumer rules to determine whether they are working as intended, and agency officials have indicated that these "impact evaluations" may well lead to internal reforms.

In his first few months in office, the new commissioner of the Food and Drug Administration, Dr. Donald Kennedy, has lived up to his reputation as a "tough cop," clashing more than once with industry over issues such as the saccharin ban and the amount of data that private drug companies must provide to the government. At the same time, however, Kennedy has been seeking ways to reduce the long delays before new drugs can reach commercial markets. The FDA's cumbersome procedures have been roundly attacked in the past, and among its more recent critics is its new departmental boss, Joe Califano.

Banking. Regulation of the banking industry has been a controversial issue in Congress for more than a year, and the Carter administration at first seemed unable to make up its

mind on what it wanted. Then in late June, it threw its support behind a bill that would allow banks and thrift institutions to pay interest on demand deposits, or NOW accounts. Coupled to that legislation is authority for the Federal Reserve System to pay interest on reserves that it requires from member banks. The measure, opposed by small banks which fear that NOW accounts could force them out of business, ran into trouble in the Senate in July, and both the administration and Federal Reserve Board Chairman Arthur Burns began looking for an acceptable compromise.

Actions at the Justice Department. Attorney General Bell and the young head of the Antitrust Division, John Shenefield, along with Pertschuk at the FTC, have been sending out a steady stream of signals that the government should take a much more aggressive approach to industrial concentration. Companies that dominate their fields through their own marketing and economic efficiency may no longer be immune from attack, and bigness per se—as opposed to anticompetitive behavior—may become a foundation for government anti-trust suits.

The Justice Department is also circulating a memorandum suggesting that private class action suits might be a useful new weapon for enforcing the decrees of regulatory agencies. Legislation permitting such suits would bring howls of protest from the business community (*Barron's* recently called them "legal lynch mobs"), but a bill allowing their use to enforce the rules and regulations of the Federal Trade Commission is now wending its way through both houses of Congress.

IN SUMMARY, during its first six months in office the Carter administration has constructed a record of almost studied ambiguity on regulatory reform. The President's rhetoric on this subject has always been tinged with a missionary zeal, and many of his actions have pointed toward a substantial reduction in the regulatory burden. Yet, many other actions and proposals indicate that his commitment is not uniformly shared among his appointees and that Carter himself, when faced with contravening political or economic pressures, is quite willing to bend in the other direction. Unless there is a sharp change in strategy, the "fire in Washington" promises to burn on for some time to come. ■