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REGULATORY REFORM -- Reality or Illusion?

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In a week highlighted by occupation of the U. S. Embassy in Tehran, announcements of Presidential candidacies, and debt guarantees for Chrysler, I am gratified by this interest in a subject as "unsexy" as regulatory reform. Over time, the collective implications of federal regulation are so profound that they may have an even greater impact on our society than the news events of the week.

Federal regulation raises complex problems that need to be understood and addressed. Their solutions will require resolution of desirable, but often competing goals. Our federal regulatory machinery is, in many ways, the legacy of a generation which proliferated well-intended, but not always effective, regulatory efforts to deal with noneconomic issues relating to the quality of life in a setting of unprecedented economic prosperity, and of commitment to achieving social goals. It has not worked uniformly well and the economic growth that spawned so much social legislation and regulatory initiative has waned. Thus, the process needs to be reassessed and the machinery reshaped to reflect our regulatory experience and to deal most effectively with the economic and social challenges which we now face. For that reason, I am sympathetic to the broadly-based movement in favor of regulatory reform. I am, however, increasingly concerned that the particular themes

commonly embodied in many of the proposals currently before the Congress would not be effective and would produce undesirable consequences.

I would like to share with you today some thoughts on how the consensus that federal regulation should be reformed might be channelled productively. The subject is not one which lends itself to easy or quick solution. It deserves the thoughtful consideration of all who are concerned about the long-term consequences to our society of a citizenry which has increasing doubts about the effectiveness of its government and whether it is pursuing ends consistent with the needs and aspirations of the governed.

The Limits of Regulation

I want first to examine the source of the present discontent with the regulatory process. In my view, it results from five basic failures. First, agencies have often taken regulatory actions without adequately weighing their impact on the larger society. Second, as Congress has enacted new regulatory laws in response to perceived problems, it has not reconciled new programs and goals with existing ones -- leading to internally-inconsistent national policies in many regulatory areas. Third, Congress has not provided sufficient oversight

and guidance to agencies -- a failing which often results in regulatory programs that are out-of-touch with intended goals. Fourth, we have asked the regulatory process indiscriminately to deal with problems that do not lend themselves to regulatory solutions. Fifth, we have been buying more regulation than we can afford -- we have failed to consider the aggregate impact of regulation and to set goals compatible with the state of the economy.

This last point is particularly significant, for it is the limits of what we can afford that make each of the other four failures less tolerable. In 1970, the Council of Economic Advisers, in a little noted statement, endeavored for the first time to project their view of the economy over a period of years. They anticipated a cumulative Gross National Product during the following five years on the order of $6.3 trillion. They then proceeded to set off against this GNP what they called "known claims" -- those commitments which we, as a society, had already made. They factored in such things as the winding down of the war in Vietnam and Congressionally-mandated increases in Social Security. When they subtracted these cumulative "known claims" from the $6.3 trillion, they

concluded that we had total uncommitted gross national resources over the five years of only $23 billion -- all falling in the last year of the projection. They then said, in essence, that we must be prepared to make choices, that if we want more of something, or if we want something new, we have to be prepared to give up something we already have.

It is not important how quantitatively accurate the Council's projections turned out to be -- although, in fact, they were quite close to the mark. The underlying concept is certainly valid -- society, however fast its real economy grows, but particularly when it does not grow rapidly, can only afford so much.

Only recently has there been any significant degree of public recognition that we cannot afford everything, that the benefits of regulation impose costs and that their burden is felt in every pocketbook.

My concern is that we do not have the established capability and mechanisms to enable us, as a society, to make conscious choices -- to understand, at least qualitatively and in gross terms, what we can afford, the opportunities we have to improve our society and the costs

of doing so, and to choose among them. What we need today, rather than new legal constraints on the regulatory process, is a mechanism to make choices and to periodically review regulatory effectiveness and continued relevance.

The consequences of the lack of such a mechanism have become painfully clear as the growth of the economy has slowed. We face billions of dollars of federally-mandated expenditures, designed to achieve very desirable objectives, which do not appear in the federal budget. These are mandated costs and transfers for many of which business is the transfer agent. Business incurs these costs, but the consumer ultimately pays them, much like a hidden tax, through increased product and service costs which eat into his purchasing power, and depending upon their real value, may be inflationary. And they eat into purchasing power without conscious consideration of whether the consumer either intends or desires the benefit.

We need to assess the extent to which we intend and can afford to be a risk-free society. Does every risk, every accident and every loss require, as a matter of societal philosophy, a statutory redress -- or a rush to legislation to prevent it from ever happening again? And, even if we are tempted to answer that question affirmatively, are we prepared to live with the kind of society

and the magnitude of the governmental role which it would entail?

Moreover, there are limitations to what sorts of affordable regulation we should seek to implement. Many governmental programs -- regulatory and otherwise -- simply do not work. They tend to be wasteful, ineffective, co-opted by special interests, and often the progenitors of unwanted, unexpected and sometimes harmful side-effects.

Furthermore, while most government employees are capable and responsible, government -- as does the private sector -- has its share of the arrogant and bumbling. While at least over the long-term, the profit motive, litigation and governmental oversight tend to minimize the ability of the venal or incompetent in the private sector to do irreparable damage, in the public sector, those disciplines are less effective and the defects can be more troublesome, as their reach is broad and are often cloaked in the righteousness of the public interest. As Justice Brandeis put it many years ago:

> "Experience should teach us to be most on guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding."

The Demand for Accountability

Thus, while the lack of an effective mechanism to harmonize regulatory goals and to determine how much regulation we can afford to buy is perhaps the single most important defect in our present regulatory structure, there is a second issue which any realistic effort at regulatory reform must address. That issue is the perception that some in government who exercise regulatory power are not meaningfully accountable for the results of their stewardship. As long as there has been regulation, there has been concern about the accountability of regulatory power. It was James Madison who said:

> "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

The fundamental tension implicit in Madison's statement underlies much of the debate over regulatory reform today. Acknowledging that it is not good form to quote oneself, I made the following statement in addressing the subject of corporate accountability several weeks ago, which I believe is equally applicable to governmental accountability:

> "Americans have a deep-seated conviction that anyone who exercises power needs to be accountable to someone else. Most people

> would, I think, regard it as self-evident that anyone who is not accountable, whose word is final and who is not subject to review and risk of removal for failure to achieve acceptable results, may, over time, become autocratic, arbitrary, and arrogant. History teaches that the unfettered exercise of power will often tend to result in a loss of contact with reality, insulation from unpleasant news, and increasingly insensitive and irresponsible judgments. The institution becomes an end unto itself, out of touch with its relationships and its responsibilities to the rest of society. Such a situation is destructive of the institution involved and those it impacts and is morally unacceptable. There is a concern, on the part of too many to ignore, that this syndrome can be found in aspects of American business, and particularly in the way the public perceives business."

The same is also true, I believe, of the public's perception of the federal regulatory establishment. Considering that a majority of House members have associated themselves as co-sponsors of a legislative veto bill; that the Senate has already passed a bill which might well dramatically restructure the relationship between the Judicial and the Executive branches; and, indeed, that persons in both parties can be elected to high public office by running against "big government," we cannot ignore the message.

Proposed Solutions

With this perspective on the sources of legitimate concern about the existing regulatory structure, I want to examine some of the proposals which have been advanced to

cure the perceived ills. At the risk of over-simplifying, these notions fall basically into two categories. Those in the first category -- which I label "procedural" -- seek to reform an agency's internal practices and procedures. They would charge the agencies with a new set of procedural requirements which must be met before the agency may act. New requirements for regulatory impact statements and increased public participation, for example, are apparently thought to create an environment in which better regulation can be accomplished.

The second category of proposals -- which I label "substantive," -- have a more fundamental goal. They would alter the historic role of administrative agencies in our form of government. Many of these concepts seek to transfer a portion of the regulatory decision-making function to others, such as the Congress, the courts, or the Executive Office of the President. Examples of such proposals include the legislative veto, the Presidential veto, and a proposal by Senator Bumpers -- already adopted by the Senate -- which would vastly expand the role of the federal courts in overseeing federal regulation.

In my judgment, implementation of the concepts in <u>either</u> category would do much to enrich the lawyers and lobbyists who specialize in dealing with government, but little to make regulation less burdensome and more rational.

A. Procedural Reforms

Regulatory problems differ vastly from agency to agency -- and even within agencies, there are often major differences from program to program. The complex patchwork of federal regulation, administered by dozens of different agencies and reaching into almost every avenue of American economic and social life, has grown haphazardly over almost a century. As a result, it is probably simplistic to look for an across-the-board procedural solution for regulatory problems.

For example, a popular proposal for procedural reform is a requirement that agencies prepare regulatory impact analyses in connection with the promulgation of rules. I agree that agencies should endeavor to analyze and predict the consequences of their intended actions. But we should not expect too much of the structured efforts required by current legislative proposals.

Regulatory impact statements work best in areas where both the costs and the benefits of regulation are easily quantifiable. To the extent that either is hard to measure -- e.g., the benefit to society of clean air, or the cost to society of meeting environmental standards -- the utility of this procedural device diminishes. Further, in focusing narrowly on individual regulations, viewed from the perspective of a single regulatory agency, impact analyses do

not provide a meaningful vehicle to gauge the value of federal regulation from a broader societal perspective -- e.g., the economic and political impact of environmental standards on energy independence.

Moreover, the impact statement is itself a very expensive device. Is it worth this cost to generate massive empirical evidence to support a conclusion that the impact of a regulatory decision is impossible to quantify or so soft as to be largely self-serving and useless?

B. Substantive Reforms

While procedural reforms focus on the internal workings of regulatory agencies, the second variety of reform proposal is calculated to impose new, external checks on regulatory decisionmaking.

Unfortunately, while consistent with the concept of increased accountability, I sincerely doubt whether any of the existing proposals for a legislative or Presidential veto, or increased scrutiny by the courts, will improve federal regulation. Indeed, I think each has the potential to exacerbate the problem. None of these proposals would facilitate the kind of serious, searching review of either individual or overlapping regulatory programs, or of the total impact of regulation, which, in my view, is essential

to meaningful reform. Rather, they would merely substitute the ad hoc judgments of other branches of the government for decisions now made by the agencies.

1. The Legislative Veto

Under the legislative veto, hundreds of regulations would be subject to Congressional review each year. What criteria will an already overburdened Congress use to select regulations for veto consideration? Agencies often spend months, sometimes years, developing a single regulation. Thus, the record on which many regulations -- and virtually all major ones -- are based is extraordinarily complex. Does Congress have the time, or the will, to wade through the thousands of pages of expert testimony, comment, technical data and analysis that each major regulation virtually always generates? If not, will the fate of regulations before the Congress rest on the merits or on political considerations?

Finally, from the standpoint of public policy, is it not dangerously narrow for Congress, or perhaps just one house of the Congress, to consider individual regulations for veto outside the context of the total regulatory scheme?

2. The Presidential Veto

The Presidential veto raises many of the same issues as does the legislative veto. The Office of the President is in no better position than the Congress to pass on the merits of complex regulation. And the danger that political considerations would transcend the substantive is perhaps greater, as the President is not restrained by the Congressional need to obtain a consensus before taking action.

There is also an issue as to the substantive effect a Presidental veto power would have. Many of the agencies whose regulations have been the most severly criticized -- such as the FDA, EPA, and OSHA -- are already Executive branch agencies and have always been subject to significant Presidential oversight.

Both legislative and Presidential veto proposals are intended to make regulatory agencies more accountable to the electorate for their actions. I fear, however, that the impact could be just the opposite. Elected officials are often subject to pressure by powerful interests in our society -- not all of them business. One of the historical purposes of administrative agencies is to insulate such officials from that pressure. What would happen if this insulation is removed?

3. Judicial Review of Agency Action

Traditionally, courts have been required to defer to agency expertise in reviewing challenged regulations, to presume a regulation to be legal and to place the burden on those challenging the regulation to establish its invalidity. Senator Bumper's amendment would shift the burden to the agency whose regulation is challenged to demonstrate its legitimacy. Subjecting challenged regulation to this kind of judicial review undercuts the very rationale for having administrative agencies in the first place. The courts cannot be expected -- nor should they be encouraged -- to substitute their general knowledge for the specific expertise of an administrative agency. The judicial process is not well-suited to decide matters of economic regulation and social policy on a routine basis. The very essence of effective rulemaking -- a nonadversarial balancing of many different and often competing interests -- is inconsistent with the case-by-case focus imposed upon federal courts by Article III of the Constitution.

This proposal would also subject regulation to lengthy periods of uncertainty, as the liberal judicial review procedures give those opposed to a particular regulation every incentive to challenge it in court. What will happen

to our already over-crowded courts, not to mention the regulatory process, should they be inundated by an avalanche of highly technical regulatory lawsuits -- requiring lengthy, complex, and expensive evidentiary hearings, briefs and arguments -- before any major regulation could become effective?

Chief Judge J. Skelly Wright of the D.C. Circuit Court of Appeals -- the court that handles much of the judicial review of the regulatory process -- is reported to have said in a recent speech that the federal courts ought to stop telling the regulatory agencies what to do. The Bumpers Amendment does not heed this admonition.

The Future of Regulatory Reform

I am a believer that once one criticizes existing proposals, he has a responsibility, if at all possible, to offer a constructive suggestion that avoids the criticism and thus contributes to the thinking. So what should we do?

In my judgment, the reform proposals in Congress fail, by and large, to recognize that what is required is an overall framework within which to improve the process. That framework calls for participation by the agencies, Congress, and the President -- including new legislation.

A. The Agencies' Role

Agencies can deal now with many regulatory problems, and they are responding. The pace may be too slow for some, but unbridled regulatory reform can be as disruptive to the nation as runaway regulation. While self-criticism does not come easily and internal resistance against change is normal, I see movement: to rethink regulatory approaches; to decrease costly regulation; to reduce burdensome paperwork; to speed up regulatory processes; to relieve the burdens of certain regulations on small business; and to be sensitive to macro-economic considerations in specific regulatory policies.

There are other avenues for immediate agency action. The agencies can insist on cost-effective means of achieving statutory goals. They can conduct more searching analyses of proposed actions. They can experiment with new and less burdensome ways to accomplish their statutory objectives. They can encourage self-regulatory efforts and private sector initiatives in determining the most cost-effective approach to the regulatory objective. They can even request Congress to revise their statutory mandates when they find that they are too narrow, too broad, conflicting or inexorably lead to unwise regulatory policies.

B. Congress' Role

While there is much that agencies can do on their own to appropriately modify an overly-burdensome regulatory apparatus, Congress has a critical role to play. If there is to be fundamental change, it must be directed by an authority greater than any individual agency. Initially, Congress should think more carefully about the consequences of the laws it passes, and of the bureaucracies and regulatory processes that it spawns. It then must engage in ongoing, consistent, and effective Congressional oversight -- not crisis-oriented activity that tends to degenerate into an attempt to fix the blame or find a scapegoat.

There are, however, real limits on what can be achieved even by a careful examination of each agency. Regulatory agencies are, by design, myopic. An agency charged with protecting the environment, for example, is not required to balance its mandate against other national goals. That is the function of Congress. We cannot expect the Environmental Protection Agency (which I am using as an example only because we are all familiar with the difficult issues involved) to fairly balance its goals against national objectives such as energy conservation, balance of payments, inflation, capital investment or unemployment. There has been some effort in recent years to foster coordination

between directly-related regulatory areas. For some agencies, such as OSHA and EPA, or the FTC and CPSC, or the SEC, bank regulatory agencies and the CFTC, much can be accomplished. But when regulatory interests are inconsistent or not obviously related, it is not reasonable to expect agencies to make the tradeoffs and accommodations necessary to achieve national goals which transcend their statutory obligations. Indeed, statutory mandates under which agencies are, by law, compelled to operate often preclude agency actions based on considerations unrelated to the agency's basic mission.

Thus, if regulation is to be rationalized with contemporary national objectives; if patterns of regulation that spring from the requirements of law are to be altered; and if the operation of our economy is to be freed from existing anti-competitive constraints, there is only one existing mechanism that can now be employed. If the President and Congress want to modify or undo what previous Presidents and Congresses have done, they will have to amend the substantive laws under which administrative regulations are issued. Amending substantive law, however, is not "regulatory" reform but "law" reform.

A Framework For Permanent Reform

What is needed, in addition to the foregoing, is an overall framework and process to coordinate national goals with regulatory action on a continuing basis. This is the only long-term approach which, to me, holds out any promise for meaningful regulatory reform.

As a first step towards the creation of such a framework, I believe Congress should enact legislation that provides for a systematic review, over a period of years, of all major regulatory programs. Such legislation should provide for substantial input from the President, the agencies and the public and also contain a mechanism which requires the Congress to act on reform proposals. This is not a new concept. Somewhat similar proposals have been advanced by the Administration and many members of Congress. However, the action-forcing mechanism which has, to date, been most popular is the so-called "Sunset" provision, which would put agencies out of business if the Congress fails to act within a specified time. I believe that Sunset proposals are, and have proven to be, unrealistic. The way to achieve regulatory reform is not to threaten long-standing regulatory programs with extinction in the face of Congress' failure to act. Instead, an action-forcing mechanism which requires Congress to act affirmatively is necessary.

Careful, coordinated reviews could lead to many important changes in individual agency mandates and programs. However, such a process would not, in itself, facilitate the kind of across-the-board tradeoffs between regulatory areas which is necessary in order to have a coherent national regulatory policy.

A possible mechanism to provide this ability can be drawn by analogy from the way Congress has handled the federal budget -- another situation involving complex tradeoffs in national priorities. In the budget, as in patterns of regulation, questions arise as to how much the nation can afford to spend on desirable goals. In the budget, as in regulatory mandates, there are compromises to be made among competing objectives. And in the budget, as in the framework responsible for regulation, there is often a divergence between the wishes of the President and the wishes of the Congress.

The analogy is not perfect, but I believe Congress could constructively build from the example it set for itself in 1974, when it acted to bring discipline and a broader perspective to the budget process. For example, as some proposals for regulatory reform have suggested, the President could be required to submit periodically -- say, during the first session of each Congress -- a "state of

regulation" report. In it, he would provide his assessment of the efficacy of existing regulatory programs. He would discuss those regulatory schemes which needed to be strengthened, and those which should be cut back, deferred or otherwise modified. He would reconcile existing regulation with his objectives for the nation and identify any conflicts. He would recommend any new regulatory laws which ought to be enacted. And, he would identify those regulatory agencies and statutes which he felt had outlived their usefulness and ought to be abolished. This would not be a "regulatory budget," but rather the considered -- and detailed -- judgment of the Executive branch as to what our national priorities should be, what we can afford at any point in time, and the choices necessary to most productively use our resources to meet these goals.

In order to handle this kind of comprehensive regulatory review, Congress would clearly have to establish some new mechanism. One approach might be for Congress to establish committees of the House and the Senate on federal regulation -- or a joint committee -- whose responsibility it would be to review and respond to the President's initiatives. The committees would not have legislative authority over specific regulatory programs, but would instead report to the floors of the House and the Senate resolutions defining areas of

regulatory change. The Congress would be required to agree in principle through the passage of such resolutions. These resolutions would not enunciate specific regulatory changes, but rather principles of regulatory direction to which the committees having jurisdiction over particular regulatory programs would be required to conform. They would state broad goals with respect to changes in regulation.

Depending, of course, on the issues of the day, such resolutions might state the sense of the Congress whether energy production should have priority over environmental protection, or that deregulation of trucking should be a priority matter. They might instruct relevant Committees to seek ways to reduce delay in the regulatory process or even raise for consideration specific Administrative Procedure Act amendments. Or they could reflect a Congressional preference for performance standards rather than design standards.

In the face of the enormous proliferation of Congressional committees and staff in recent years, I am somewhat reluctant to advance this concept; however, I believe that the present structure does not encourage or facilitate overall consideration of broad areas of regulatory policy. The proposed structure would enable Congress to focus on the whole of federal

regulation and would enable the President to provide meaningful leadership in this critical area of national priorities. In this way, Congress and the President would have a mechanism to consider the limitations imposed by finite resources on our regulatory reach, and make the necessary choices and tradeoffs.

I am offering today the seed of an idea. I believe that the concept is sound and that it incorporates the best parts of existing notions for reform. Yet, I have no illusions but that its implementation would be exceedingly difficult. In a manner similar to the Budget Act, what I am suggesting impinges on the traditional prerogatives of the various committees of the Congress. But, if we can agree that the major failure of federal regulation today has not been simply a failure of individual parts but a failure to consider the whole, I think it becomes clear that such change is necessary and desirable.

Conclusion:

Government regulations have been with us from virtually the moment this nation was founded. They have been increasing in scope, volume and complexity for two centuries in order to meet the needs of a constantly growing, increasingly complicated social fabric. Inevitably, there are flaws in

this regulatory pattern -- flaws of both excess and of insufficiency. And, unquestionably, some regulation has outlived its usefulness and needs to be modified, curtailed or even abolished.

We have just begun to recognize that regulatory ills mirror the deeper problems which plague our society. They will not be cured until we, as a society, develop a mechanism to consider regulatory problems from this perspective. If we settle for one of the many quick fixes which seem expedient, the underlying deterioration will continue.

Reform of federal regulation is part of the never-ending task of adapting our complex government machinery to the changing needs of the nation. It is a task which can be accomplished successfully only in a deliberate and focused manner, as we have seen with deregulation of the airline industry. It is not a task that is susceptible to panaceas, quick-fixes, or administrative short-cuts. I can only hope that when the smoke clears from the current wave of enthusiasm for regulatory reform, we will be left with a solid structure capable of responding flexibly and efficiently to the very real needs that regulation is designed to meet.

Thank you.