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TWO MODELS OF REGULATORY REFORM

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You are all familiar with the criticisms typically made of government regulation of industry. It is costly. Too little is recovered in return. The results of regulation are unpredictable, perhaps random. Regulatory procedures are unfair and unwieldy. And, the process as a whole is undemocratic, indeed illegitimate, entrusting critical decisions to an unelected bureaucracy. The perception that these criticisms are accurate—at least in some instances—has led to a widespread demand for “regulatory reform.” This evening, I should like to discuss two approaches to reform: the “case-by-case” approach, which I shall illustrate by talking about airline deregulation, and the “generic” approach, which seeks a single statute that will significantly improve regulation as a whole. To provide the conclusion of this lecture in advance, I prefer the former to the latter. This lecture is designed to illustrate why.

I. THE “CASE-BY-CASE” APPROACH

I chose airline deregulation as an example of “case-by-case” reform both because I know the example first hand—I helped

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Senator Edward M. Kennedy to organize his hearings on economic regulation of the industry in 1974—and because it seems to be a success. When we began our hearings the Civil Aeronautics Board fully regulated fares and entry into the industry. Fares were high. It cost \$183 to fly one-way cross country in 1973 and discounts were unavailable. Planes flew half full—nearly two-thirds empty on transcontinental flights. Industry profits were low. Today, after the Board initially relaxed its regulation, after it then administratively deregulated the industry, and after a new law made those changes permanent, fares in real terms are on average significantly lower. We can fly cross country today for \$179 despite a Consumer Price Index which has more than doubled. Planes are full. Industry profits are somewhat improved (depending on the sector of the industry) and the number of available flights, with a handful of debatable exceptions, has increased. The consensus of most experts is that airline deregulation is a reform that is working. Hence, it might be useful, in the first half of this lecture, to consider some of the elements that I believe were essential in bringing about deregulation.

In 1974 common wisdom said that airline regulation could not be reformed. Washington lawyers, noting the fairness of many Board procedures and the clarity of its policies, considered the CAB a well run agency, not an agency calling for radical change. Economists, it is true, pointed out that regulation meant prices that were too high and wasted service. But, those who studied government as well, such as George Stigler, argued that their cause was hopeless. Did not those who benefited from regulation—the industry and its workers—constitute small, well organized groups, willing and able to exert strong political pressure, while those who would benefit from *deregulation* were consumers—particularly *pleasure* travelers—who were unlikely to be aware of the issue or to feel strongly enough to organize around it for political purposes?

In fact all we had in 1974 was an academic theory explained by a handful of economists. The airline industry, they claimed, is structurally competitive. Entry barriers are not high. The firms within it strive to compete. Moreover, the pattern of flights is complex, and demand, varying with the business cycle, is volatile. What will happen, they asked, if a regulatory agency tells the firms within such an industry that they cannot compete

in price? The answer is that firms will compete in service instead. Thus, we shall find gourmet meals, flying "Aloha Bars," and, most important, *many frequently scheduled, half empty flights*. As one of our witnesses put it, "the business traveler is delighted to find an empty seat on which to rest his brief case. But, would he be so pleased if he realized that he is paying full fare for the brief case?" Of course, some of us did half realize the political, as well as the economic, significance of this theory—that it meant that, as a candidate for regulatory reform, the CAB hung like a ripe plum ready for plucking. When Senator Kennedy declared a strong interest in regulatory reform, it was possible to argue that the CAB was the place to begin.

I should now like to go back to 1974—where we began with an economic theory and Senator Kennedy's interest—and point out four elements of the subsequent reform effort that I believe were necessary to make the issue politically visible, which in turn helped bring about the subsequent administrative and legislative reforms. I suspect these four elements will comprise a necessary part of most efforts to bring about significant change in an individual regulatory program.

A. Detailed Information Gathering and Factual Analysis

First, and in my view most important, is a serious detailed effort to gather and analyze facts related to the actual working of the particular industry and regulatory program. The economic theory at most offers a starting place and a framework for organizing the facts and arguments about whether change in the program is necessary. But theory alone cannot show that change is desirable. For one thing, any actual regulatory program may in practice serve a host of subsidiary objectives that the theory overlooks. Airline regulation, for example, might have saved fuel, protected the environment, or stimulated the development of small communities. For another thing, regardless of a program's theoretical merits, firms, workers, customers, and suppliers may have staked their investments—indeed their working lives—on the regulatory status quo. An empirical effort must be made to determine whether it is likely that change will produce benefits that outweigh the costs of disturbing this fixed reliance. Further, the truth of the theory depends upon the facts, and the facts are often in the hands, not of academics, but of those in the indus-

try. Academic studies showing that cross-country airline fares were too high were far less convincing than projections by Boeing and Lockheed that with an all-coach seating configuration and planes filled to seventy percent of capacity, an airline could cover its costs in 1974 by charging about \$100 per cross-county ticket instead of \$180. Finally, a detailed investigation is necessary to convince those with the necessary political power that the proponents of reform have made their case—that the necessary homework has been done.

Let me give two examples, drawn from our hearings, of the type of detailed, industry-specific work that is necessary. First consider the controversy over the California and Texas experience with unregulated intrastate airlines. Open competition was allowed in California until the mid-1960s. And the Texas Aeronautics Commission in the early 1970s allowed a new firm, Southwest Airlines, into the market with freedom to cut fares. The result was fares on non-CAB-regulated intrastate routes only 50-60 percent as high as those on apparently comparable (regulated) interstate routes. For example, in 1974 the traveler flying 338 miles between San Francisco and Los Angeles on Pacific Southwest Airlines (PSA) paid \$18.75; the traveler flying the 339 miles between Washington and Boston on CAB-regulated carriers paid \$41.67.

The regulated airlines argued that this comparison was misleading. California and Texas were “special cases.” The fare differences reflected: (1) weather conditions, (2) greater traffic density, (3) direction of traffic flow, (4) less air and ground congestion, (5) fewer costs from interline connections with other carriers, (6) different aircraft types, (7) less need to provide “through” service, and (8) less need to support other routes in the system.

The subcommittee then tried to examine each of these factors. A check with the Federal Aviation Administration revealed that there were no significant additional costs due to weather differences. An analysis and comparison of a host of different interstate and intrastate routes showed that the same price differences existed for routes of identical traffic density (for example, Los Angeles-Sacramento transporting 915,000 passengers per year, and Boston-Washington transporting 981,000). By using “block-to-block” (ramp-to-ramp) times for purposes of comparison, one could eliminate the effects of air and ground con-

gestion; again, the price difference stayed the same. The subcommittee requested the Air Transport Association (the major industry trade association) to commission an independent study of the causes of fare differences. That study showed that the host of differences listed by the industry could account for no more than \$6 of a price difference that amounted to \$20-30 on most routes. The subcommittee went on to request cost information from the airlines as to specific routes. American Airlines submitted detailed information, which showed that their Boston-Washington flight cost \$5,752 round trip, based on a Boeing 727-200, with 121 seats, filled on average 55 percent full. PSA, flying the same plane in California, installed 158 seats, filled an average of 60 percent full. Thus, if American had carried 95 passengers on average, as did PSA, instead of 66, it could have reduced its fares 30 percent. This fact went far toward showing that the price difference reflected fuller planes, and it helped support the argument that price competition induced the airlines to offer the lower-fare/fuller-plane service that most travelers wanted.

All information was compiled and sent to the airlines with a request for confirmation, refutation, or additional information. The information and the responses allowed the subcommittee to write a section of its report that dealt comprehensively with the California and Texas experience and carefully described the considerable extent to which it offered support for regulatory reform. The net result was that the argument against the use of the California experience simply dropped out of the public debate. As late as the spring of 1975 the chairman of the board of United Airlines, in a letter to *The Wall Street Journal*, vigorously defended the claim that California was a "special case," listing most of the factors mentioned above. Once the subcommittee's letter with its accompanying information was circulated, however, the carriers stopped making the "special case" argument. Of course, the trained economist might not have needed all that investigation in order to be convinced of the relevance of the California experience. But the airlines themselves—and as a result, the informed public—could not be convinced until they were shown that their objections had been considered, treated fairly, and investigated thoroughly. Then, however reluctantly, they were convinced (or at least saw no further advantage in the issue), and the point was established as valid in the public policy

debate.

As a second example, let me describe how we dealt with the most powerful argument against deregulation, namely, the argument that deregulation would mean an end of airline service to smaller communities. The subcommittee's treatment of the "small town" argument illustrates the way in which different types of evidence can be marshaled in support of a conclusion. The argument (in support of regulation) consisted of the claim that airlines earning large profits on popular routes used them to subsidize service to smaller communities. The traditional reply—that it was unfair to charge the cross-country traveler more to subsidize the air travel of others—was unconvincing to those who feared loss of service to their own smaller communities. After looking into the subject, the subcommittee agreed with general academic researchers in reaching a stronger conclusion: the argument was weak because no significant amount of cross-subsidy existed. The subcommittee then supported the conclusion with evidence.

First, the subcommittee report, drawing on the academic argument of George Douglas, James Miller, and George Eads, claimed that it was illogical to believe that many airlines provided service on routes over which (incremental) costs exceeded (incremental) revenues. For one thing, service competition (especially extra scheduling, which tends to reduce load factors) on heavily traveled, long-distance routes would tend to eat up any extra profit. And transcontinental load factors were indeed lower than average system-wide load factors. In addition, the CAB for some time had allowed carriers to abandon money-losing service. Why would the carriers not have done so? Further, accounting conventions tended to understate the profitability of short hauls. Finally, commuter carriers already provided service to hundreds of smaller communities and stood ready to pick up service that the trunk lines abandoned.

These arguments, supported with facts, nonetheless proved less convincing than an argument made on the basis of firsthand experience with United Airlines. The committee asked United Airlines to determine how many routes it might abandon under deregulation because they were unprofitable in the sense that revenues generated (in 1974) "failed to cover incremental costs." United first wrote that it would consider abandoning as unprofitable 75 of the 327 city pairs that it served. It later revised its

estimate to 58. I, as Committee Counsel, went to Chicago with George Eads, then assistant director of the Council on Wage and Price Stability, and spent a day going over a computer printout of United's route system together with United's executives. By the end of the day, there was agreement on several points. The fact that United's accounting system showed these 58 routes as unprofitable did not necessarily mean they were so, or would be abandoned with deregulation. Four of the 58 routes were flown in order to position aircraft; 17 were flown because they generated traffic that flew United to a farther point. These 21 city pairs formed an essential part of a larger route than was profitable overall. Thus, United would classify only 37 routes as actually unprofitable. From these 37 one should subtract 8 more routes, each of which was shorter than 60 miles in length, for it was inconceivable that trunkline service was needed on routes of 24, 30, or 57 miles. (Such segments in fact formed part of a larger "loss route," and these had been double counted.) There remained 29 route segments that might be viewed as beneficiaries of cross-subsidy. These 29 segments averaged 155 miles in length; they accounted together for 130 million revenue passenger-miles, or one-half of one percent of United's total domestic revenue passenger-miles. United claimed that it lost \$5.5 million serving them. The important point is that if United's cross-subsidy experience was typical, and even if commuter airlines did not pick up such abandoned routes, all such service (nationwide) could be retained through a small direct subsidy of \$25 million. In other words, direct though impressionistic evidence from the nation's largest airline showed the problem as relatively insignificant.

What I want you to retain from these examples is not the detailed argument or conclusion, but rather the fact that they *are* detailed and industry-specific. The detail and thoroughness of the investigation (through the hearings) led to a comprehensive report. This, in turn, both increased the force of the pro-reform position in the public policy debate and also gave the politicians the feeling that they knew what was at stake—that airline deregulation was both desirable and safe to support.

B. Political Visibility

The second element essential to the reform effort is the

drawing of the public's attention to the issue. If a reform is controversial, the politicians, whose support is necessary, are more likely to become involved if they will be seen by their constituents and others as accomplishing a worthwhile objective. At the same time, the more visible the issue, the more likely the politician will be questioned about it; hence he must prepare an answer. Further, visibility of a "good government," "reform" issue is the most practical way to counteract the harm that the pro-reform politician would otherwise suffer at the hands of those knowledgeable groups that prefer the regulatory status quo.

In the case of airline deregulation, the Kennedy hearings made the issue politically visible. The press played a valuable role in the process. The hearings called attention to the issue by presenting it in dramatic form. They moved on two levels at once. On one level they gathered in written form the masses of dry, detailed fact needed to write a report and develop proposals. But they also moved on a more dramatic oral level, which sought to illustrate the issues clearly and succinctly for the layman. The story could have been entitled, "how the CAB, which is supposed to help the public by keeping fares low, is hurting the public by keeping fares high." It was told through the structure of the hearings—a different aspect on each of eight days—and through the organization of witnesses. On the first day, for example, representatives of five major government departments and leading independent economists all testified that the CAB policies were detrimental to the public interest. Only the airlines supported the CAB. This arrangement immediately raised a set of dramatic questions. Why was the relation between Board and industry friendly, while that between Board and Executive Branch hostile? The first day of hearings raised that question; the remaining seven days answered it. Moreover, the hearings were structured issue by issue to present confrontations. There were claims, responses, rebuttals, rather in the manner of a court proceeding. Questions were designed to bring out the main points in a fairly simple way. For example, the Board never could satisfactorily explain why it spent 60 percent of its enforcement resources trying to stop fares that were too low and only 3 percent investigating complaints that fares were too high. The question of "why are fares 40 percent lower in California?" became devastating, because the Board simply did not have a good answer.

For another thing, the hearings produced some newsworthy events. On the first day the Administration announced at the hearings a new deregulating policy. The next day, the *New York Times* wrote on its front page, “[d]enouncing the impact of the Civil Aeronautics Board as inequitable, inefficient, and uneconomical, the Ford administration said today that it would introduce legislation aimed at substantially reducing the power of the Board to regulate the airline industry.” The article went on to describe Senator Kennedy’s hearings, thus calling attention to their existence and suggesting that they constituted a major event. Other newsworthy events chided the Board for denying that it had unlawfully frozen route awards only to be confronted with a “secret” Board memo proving the contrary, and for its officially announcing the abandonment of its restrictive route policies. These events and others illustrated—in a manner likely to be conveyed to the public—deep, sophisticated problems with the basic concept of airline regulation.

The press, perhaps stimulated by the apparent likelihood of significant changes in Board policy, also wrote about the lengthy report that emerged—though not for its dramatic qualities. The report was designed to be a thorough analysis of the relevant issues, drawing upon the facts produced for the hearings and upon the detailed industry and Board comments upon earlier drafts. *Business Week*, for example, wrote “the Report is the greatest in-depth analysis of airline affairs since regulation of the industry began in 1938 and it effectively answers many of the preregulation arguments of the airlines and CAB. It provides the economic underpinnings for major changes at the CAB.” Without the previous press attention these stories would not have been written. But they were written and may significantly have raised the issue’s visibility—to the point where President Carter, campaigning in 1976, made the issue his own, and later, as President, appointed to the Board a chairman, Alfred Kahn, committed to making the necessary changes.

C. Creating a Political Coalition Favoring Reform

The third element of this individual case history was the establishment of a broad political coalition favoring reform. This in large part is a function of characterizing the issue, as it becomes visible, in a way that will strengthen the alliance in its

favor. Thus both President Ford and Senator Kennedy depicted airline deregulation as part of a broader effort to help the consumer and to lessen the burdensome regulatory bureaucracy. If the issue is seen as one of “lower prices,” “helping the consumer,” or “freeing business from the dead hand of regulation,” it can pick up support from many persons who will not interest themselves in “higher airline profits,” “more efficient use of aircraft,” or “more efficient or effective airline regulatory programs.” Political support is, in part, a function of how one sees the issue—how it has been characterized—and that is a matter partly, but not wholly, within the control of those who seek reform.

The coalition must be formed both inside and outside the government. Without the support of much of the Department of Transportation, the Council of Economic Advisors, the Department of Justice and others within the government, the CAB could not have been isolated and the White House was less likely to have picked airlines as a showcase of regulatory reform. On the outside, coalitions can be built by looking not only to those with similar economic interests, but also those with similar ideological views. Thus, not only consumer groups supported airline deregulation, but so did business groups, conservative senators and others who believed in *laissez faire*, while the industry and unions sought the support of politicians whose ideological instincts favored regulation.

D. Practical Arrangement for Reform and Transition

A fourth element of case-by-case reform is the need for a practical reform plan. The reformer must develop a practical and fair plan to allow a transition from the regulated regime to the new system. Such a plan serves three functions. First, it demonstrates that the reformer has thought the problem through, to the point where one can see concretely who is likely to be helped or hurt over the next few years. This fact helps overcome a fairly common fear of the unknown. Second, it allows the reformer to ease the adverse effects of sudden change on those who might be hurt. To force those who have relied on the past system to face sudden drastic change without some sort of cushion is often unfair. Third, from a strictly political viewpoint, a transition plan that cushions adverse effects and allows

those who gain from the change to compensate losers will soften the political opposition and facilitate its passage.

Airline deregulation did not require a complex transition system. Rather, the announcement of its consideration together with the several years needed to bring the new system into being—through the appointment of a new CAB chairman and the enactment of new legislation—itself provided gradual change, cushioning the effect of the change and allowing those affected time to adjust.

I do not believe that the airline regulatory reform effort would have been successful had it not embodied the four elements. Even so, the effort took time. We began in 1974 and 1975 with Senate hearings. President Ford then appointed a new CAB Chairman, John Robson, who began to relax the Board's restrictive regulations. The first concrete result was National Airline's "no-frills" fare to Florida in early 1976. President Carter issued a position paper favoring airline deregulation during his campaign. He appointed Alfred Kahn, an economist, as Chairman of the CAB, and Kahn chose his top staff in large part from those who had been strong advocates of reform, some of whom had worked on the hearings. Kahn began the process of administratively deregulating. Senator Cannon held additional hearings and a deregulation law, sponsored by both conservative and liberal senators, was enacted in 1978. Airline deregulation—with a few hitches—has been underway for the last five years.

To recapitulate, I have listed four elements of the airline regulatory reform effort that I believe were essential to the effort's success. They included (1) a detailed information gathering effort and factual analysis; (2) an effort to achieve political visibility; (3) the creation of a coalition centered on airline reform; and (4) a practical arrangement for transition. My motive in describing these elements in detail is to show you that they are program-specific. While trucking regulation, for example, presents a quite similar economic problem, the trucking reform effort has required enormous time and effort focused upon the trucking industry itself. The *form* of any such effort may be capable of generalization, along the lines of my four elements. The effort's *content*, however, is drawn from the specific industry and program under consideration. Any such reform effort takes time, but as both airlines and trucking suggest, the results can

be dramatic.

II. THE "GENERIC" APPROACH

I should now like to discuss an entirely different approach to regulatory reform. I call it the "generic" approach, for it seeks to apply a single set of changes to many different programs or agencies in an effort to make them *all* work better. Most generic changes—proposed over the past fifty or sixty years—fall into three categories: proposals for better personnel, for better procedures, and for better governmental "structures."

Those who have argued for the appointment of better people to positions of agency responsibility have not satisfactorily met the problems of how to identify those people and how to get them appointed. I doubt that many senators would call the President and say, "I should like you to appoint Smith, a man who is badly qualified for the job." Moreover, if we knew for certain who these better people were, should we have them running regulatory agencies? Perhaps the nation would be better off if they ran health programs, large businesses, disarmament conferences, or labor unions. To call for "better appointments" answers every problem of government, and for that reason, answers none.

"Better procedure" tends to be the lawyer's answer to most problems. Today, there are those proceduralists who would like to make the informal rulemaking process more formal. There are others who would like to make the formal rulemaking process less formal. While I would not deny that a bit more or a bit less cross-examination can sometimes make a difference, it is difficult to believe that changes in agency procedure can bring about any major change in government regulation.

If "better procedure" is the law school approach to regulatory reform, changing management structure reflects the point of view of the business school. Thus, in the past the Ash Council recommended making the independent agencies less independent and replacing many collegial regulatory bodies with "single heads." It is not difficult, however, to think of many single headed agencies which are considered failures and collegial bodies which are viewed as comparative successes. Indeed, it is easy to remember a time when those who wished to reform the Federal Trade Commission urged that the chairman have less power; with a change in personnel, they began to urge that the

chairman have more power. While management structure may indeed make a difference, I am skeptical of its ability to achieve systematically different results.

In any event, the generic reform proposals currently most popular foresee a different form of structural change. They share a common view of the cause of regulatory failure, namely, "the agencies lack adequate control." They share a common response, namely, "let us supervise the agencies more closely." Of course, one immediately asks, "how?" Who will do the supervising? Given our form of government, it is not surprising that there are three possible answers: the Legislature, the Executive, and the Judiciary. Indeed, each of the three prime generic reform proposals currently under discussion chooses a different branch of the government as its prime supervisor. Let us examine each of them more closely.

A. *The Legislature*

The most popular current proposal would give one or both houses of Congress an opportunity to veto any major rule of an agency after it is promulgated but before it takes effect. Those favoring the veto point to the enormously broad power that Congress has delegated to the agencies: the FCC is to award licenses on the basis of "the public interest, convenience, and necessity"; OSHA is to ensure "safe" and "healthful" places of employment; the FTC is to eliminate "unfair and deceptive" practices. They claim that more narrowly drafted regulations are impractical, yet the public's elected representatives ought to influence directly or check the manner in which that power is exercised.

The veto, they claim, provides a desirable, practical check on the growing power of the President and the agencies. The size of government has increased exponentially since 1789. The knowledge explosion has made it nearly impossible for Congress to cope with the needs of the electorate. Congress must respond flexibly to specific problems, yet finds it difficult to generate detailed expert factual information and is captive to what the executive branch tells it about the need for legislation. Thus, the only practical way for Congress to set legislative policy within the "separation of powers" framework is for it to delegate broadly and then to disapprove agency actions that it does not

like.

Those opposing the veto argue that it will, in practice, become a congressional staff veto. Agencies in self-defense will have to seek the advice of congressional staff *before* promulgating a rule, and participants will therefore try to convert that staff before approaching the agency. Since Congress has no set procedures for doing so, the parties will thereby circumvent agency procedures designed to allow all parties to see and comment upon one another's claims. Moreover, all the special interests will look to Capitol Hill for a second bite at the apple. The rules likely to be debated or vetoed will be those to which affected groups attract a committee chairman's attention. Thus, Congress might be more likely to intervene where an agency seeks to regulate powerful private interests. Further, the existence of the veto would make it difficult to plan. An ICC chairman could not plan to introduce a comprehensive procompetitive reform of trucking regulation, because his pricing regulation might be approved while his entry regulation was vetoed. Finally, the political effect on the members of Congress is itself uncertain. A veto might give them more power, but at the same time it may lead their constituents to hold them directly responsible for all the actions of the bureaucracy.

Although legislative veto provisions have been enacted with increasing frequency and nearly three hundred appear in different pieces of legislation (particularly appropriations bills), their constitutionality is in question. Every recent administration, whether Democratic or Republican, has argued that the veto is unconstitutional. They claim that it violates the "presentation clause" of the Constitution—the clause that requires all legislation to be presented to the President for his approval or veto prior to becoming law. They also argue that the one-house veto violates article I, section 1 of the Constitution, which requires all legislation to secure the approval of *both* houses of Congress. Of course these clauses only apply to "legislation." Congress can only exercise "legislative" power (with certain specified exceptions), and therefore cannot constitutionally exercise a veto unless the veto is a form of legislation.

The proponents of the veto find this reasoning too formalistic. Given the reasonableness and desirability of the legislative veto, the Constitution's language should be broadly interpreted to allow it. The Court of Claims decided by a vote of four to

three that a one-house veto was constitutional, but the United States Court of Appeals for the Ninth Circuit recently ruled against its constitutionality. The Supreme Court has agreed to decide the question.

The two arguments that I find most convincing are first, that the "veto" would bring Congressional staffs directly into the day to day work of the agency. This would be hard to do in a way that is on balance likely to improve the process. Second, the veto is unlikely to have led to deregulation of airlines, of trucking or major reform elsewhere. It is a proposal that primarily favors the status quo.

B. The Executive

Proposals that would strengthen the President's power to influence agency policies have been made in the past (by Professor Emmette S. Redford) and more recently by Lloyd Cutler and Senator Roth, who argue that the President has become unable to coordinate policies among the executive branch and independent agencies. With the support of the American Bar Association, they propose a statute that would allow the President to direct an agency to take up and decide any regulatory issue within a specified period of time or to modify or reverse an agency rule or policy. In other words, the President himself, acting under certain procedural constraints, could reverse most agency policy making. Presidential action would be subject to congressional review either through a legislative veto process or by requiring Congress to renew the President's authority at regular intervals.

A statute is required because most regulatory statutes delegate power not to the President but to the agency head. Thus, the President cannot overrule the agency head on a particular matter, but can only dismiss a regulator who displeases him. Andrew Jackson, for example, could not overrule his secretary of the treasury when the secretary refused to withdraw public funds from the Bank of the United States, but he could (and did) fire him. The result is that agency heads in practice have considerable autonomy, because Presidents are unwilling to fire a major public official except over a very important matter. Some who hesitate to undermine this agency autonomy still seek to increase coordination by encouraging groups of regulators and

White House officials to meet regularly to discuss policy matters.

There is much to be said for the Cutler proposal. It would allow the President to bring about increased policy coordination among agencies, to prevent major departures from his policies, and to prevent actions he would consider seriously mistaken. It would also involve him more directly in regulatory matters, providing increased opportunity for major change. Since the Council of Economic Advisors and the Bureau of the Budget have great influence on the White House staff, changes in these areas changes might be in a procompetitive direction.

On the other hand, the proposal has its problems. For one thing, will it mean that groups adversely affected by agency action simply come to the White House for a second opportunity to defeat it? For another, even if a President is less willing to protect a special interest than is, say, a subcommittee chairman, his agenda is still highly political. Arguably, political considerations should not be brought to bear piecemeal upon individual agency regulations. Moreover, why is the President's policy likely to be so much more sensible than the agency's? One might argue that the President has higher-quality economic advice available in the Council of Economic Advisors or the Bureau of the Budget; but the agency has many more facts at its disposal and is more familiar with them. Would the proposal require a much larger White House staff? Further, if the President follows the advice of his economists, will he inject economic considerations where Congress specifically did not want them? In the final analysis the direction that any reform takes under the proposal depends upon the substantive policy directions preferred by the President. The proposal itself produces little pressure to move in any one direction.

C. The Judiciary

Senator Bumpers and many other critics of the regulatory process would have the courts examine the rules, regulations, and legal decisions of agencies with greater care. At present, courts tend to reverse such agency decisions if the decisions are arbitrary or outside the authorizing statute. In practice, courts defer to agencies on many legal matters, the exact degree of deference depending upon a host of factors, including the nature of the legal decisions at issue. The basic object of Senator Bump-

ers' proposal is to encourage more active court review and less deference.

The aim of this proposal is to assure agency fidelity to congressional statute. Agency decisions will have to be more carefully supported in the record, and agency employees will have to be more careful. Judges will be encouraged to learn more about the technical bases for agency decisions—to learn statistics, if necessary, and to understand scientific language and reasoning. Fewer irrational agency decisions will take effect.

Bumpers' proposal, while popular in the legislature, has its drawbacks. Even if its intent is only to send a signal to the courts to defer less to the agencies, how much less deference ought there to be? Would one want, for example, to insist that judges rehear the merits of, say, the "separations manual" for allocating the joint costs of telephone service? Do the courts have the time or the resources to examine such decisions de novo? From a political perspective, one cannot be certain which groups will be favored. The business community, for example, might like to see OSHA take greater care, but it may feel that greater scrutiny of the Nuclear Regulatory Commission means only longer delay in issuing licenses. From the perspective of regulatory policy, the effect of the proposal is also indeterminate. As the example of natural gas regulation makes clear, it is sometimes the courts, not the agencies, that seek to expand the scope of regulation. By slowing down agency proceedings and examining more closely the relation of the agency decision to the authorizing statute, will stricter review mean less experimentation? Will it make agencies hesitate to look for new but less restrictive ways to carry out their mandate?

Moreover, to what extent are courts likely to bring about better substantive policies by giving agency decisions a "harder look"? Appellate judges base their decisions on a record. This record typically reflects a trial, a hearing, or some other procedure under which lawyers present evidence and make arguments. This system is fair (at least if the contesting parties have roughly equivalent resources) because the parties have a roughly equivalent chance to present their own side of the story and contest that of their opponents. It is reasonably accurate as to typically adjudicative matters such as who did what to whom when. But are these typical courtroom procedures accurate as to the hotly contested, constitutional, uncertain matters of *legislative*

policy? Is carnauba wax really dangerous? What about saccharine? A record on these subjects made at length by paid advocates reflects what they choose to put in it; such a record, once made, is not readily changed; and the judge who reviews the record cannot use the telephone to clarify obscurity or to discover, by calling different experts, the present state of scientific knowledge. When society's interest is that a matter be decided *fairly*, court-type procedure and judicial review may help. When society, however, is vitally interested in the *accuracy* of the result and when *legislative* facts are at issue, I am less sanguine about the usefulness of legalistic procedure.

As I end this discussion of generic proposals for structural reform, I believe I have said enough to make two basic points. First, I have explained what generic proposals are, illustrated those that are currently popular, and demonstrated that the extent to which they will bring about significant reform is debatable. Second, it should be clear that none of these proposals embodies, or encourages the development in any individual case, of the four elements that I identified as essential to the success of airline deregulation. They do not foresee individual detailed work related to the particular regulatory program and affected industry; they provide no mechanism for bringing an instance of needed reform to the public's attention; they do not augment the creation of political coalitions; and they do not encourage the creation of practical transition plans. On the other hand, they do apply to many different programs and thus arguably will improve regulation "across the board."

III. CONCLUSION

Now that I have set before you two quite different approaches to regulatory reform, let me, in conclusion, pose several questions. These questions will suggest why I prefer the case-by-case approach.

1. Is airline regulation the only instance in which "reform" means radical change of an existing regulatory program? The answer to this question is "no." Trucking regulation, for example, is already undergoing major reform. Students of the regulatory process have suggested that major change is also appropriate in other areas. Should classical regulation designed to minimize large windfall profits, as in the case of natural gas reg-

ulation, be replaced with windfall profit taxes? Should there be less economic regulation of ocean shipping? Should existing "command and control" regulation of the environment be supplemented with "environmental taxes" or "marketable rights?" Should safety regulation encourage collective bargaining on safety issues—perhaps with governmental participation? To what extent should the agencies search for "less intrusive" forms of regulation that might be both less burdensome and more effective in achieving the regulation's ends? Enough work has been done to suggest that many regulatory programs are candidates for major substantive reform of one kind or another.

2. How is "generic reform" of the sort proposed going to encourage the more radical changes in specific existing programs that may be needed?

3. If the generic proposals now being considered are not likely to bring about needed reform because they do not contain or encourage case-by-case efforts structured in terms of the four elements I have discussed, is it wise to devote scarce political time and effort to these generic proposals?

4. Are there other generic proposals that might encourage, in an institutional sense, the case-by-case approach in individual instances? Certain proposals of this sort—mostly variations of the "sunset" name—have been suggested but are not now at the top of the Congressional agenda. All this, of course, simply suggests the obvious conclusion: the task of "regulatory reform" is difficult but not impossible. And, much work remains to be done.

