

# THE REGULATORY REVOLUTION AND THE NEW BUREAUCRATIC STATE

## Part II

by John Adams Wettergreen

Last spring, in my first Bradley lecture, I described "the regulatory revolution" as the transformation of the regulatory system that took place between 1970 and 1974. Today I would like to sketch the kind of politics and government that was established by the revolution. As I do so, it also should be clear why the movement for deregulation fizzled out in the 1980s, although it was one of the three legs of the so-called Reagan Revolution of 1980, together with supply-side tax cuts and the defense buildup.

The most obvious signs of the regulatory revolution were enormous increases in the number of federal agencies regulating commerce and in the number of social, political, and commercial activities regulated by the federal government. Over 70 percent of the current regulatory apparatus is, in one way or another, the product of the regulatory revolution. In other words, the amount of change that occurred in those four years is unmatched in any period in American political history, including the New Deal and the progressive era. Although the economic costs versus the benefits of this change were enormous, I believed then, and still do today that the importance of the regulatory revolution was qualitative and political, not quantitative or material: There was a vast centralization of administration, a consequent weakening of the central government, an unlimited and unconstitutional extension of regulatory authority, consequent social and political debilitation, and a corruption of American public life.

**Fundamental Flaws.** Today I can explain, far more precisely and correctly than last spring, what the principle of and the condition for the regulatory revolution were. The principle may be called "postindustrialism." It is a conviction that the American commercial system is fundamentally flawed in ways that were unknown and unknowable to our forefathers. The condition of the regulatory revolution was the administrative failure of the Great Society's attempt to establish a bureaucratically administered welfare state. Once the principle and the condition are grasped, the difficulties faced by the Reagan Administration (or any administration that favors commercial freedom and limited government) will be plain.

### THE ADMINISTRATIVE COLLAPSE OF THE GREAT SOCIETY

Public choice theorists are correct: By using regulatory agencies, the advocates of the Great Society compelled the private sector to pay for social programs that might otherwise

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have shown up "on-budget" as massive government outlays. But the political reality of the 1960s was that the advocates of the Great Society were nearly Utopian in their economic projections. In its early years, as was especially evident in the campaign of 1964, the Johnson Administration actually believed that there was a danger of massive surpluses in the late 1960s — if the domestic spending did not increase fast enough. To have to find a way to avoid government expenditures on social problems, as the regulatory revolutionaries did, was a confession of the bankruptcy of the Great Society and of Keynesian economics on which it was based.

**Threats to the Welfare State.** In fact, the first signs of the Great Society's fiscal and monetary problems had already begun to show in mid-1966, when Congress sought greater power, as against the President, to control inflation; indeed, in 1966 the Employment Act of 1946 had to be amended to allow the greater inflation that Keynesian theory held to be necessary for the sake of increasing employment; even that early, inflation, unemployment, and slow economic growth threatened to sap public support for the Great Society.

Nevertheless, the welfare state's really serious problems of public finance and its threats to the economic growth (that supported welfare programs) — the "stagflation" of the 1970s and the massive deficits of the 1980s — took a decade to develop fully and become obvious to the people and their representatives.

**Centralizing Administration.** Even before the difficulties of financing the welfare state began to appear, grave administrative difficulties and, therefore, political problems with the Great Society had emerged. These are all but forgotten today, but they were so grave that, in the end, President Johnson tried to cover them up. In large part, he succeeded even though by 1965 leading poverty warriors understood, as Charles Murray now has shown in *Losing Ground*, "Progress stopped coincidentally with the implementation of the Great Society's social welfare programs" and "increases in expenditures coincided with an end to progress." As soon as the elections of 1966 were over, the President and the congressional Democrats were willing to acknowledge some of these administrative problems among themselves and sometimes even in public, and they tried to do something about them. The result was called "creative federalism," which meant paying the states to cooperate in the administration of the Great Society's social welfare programs.

Creative federalism was in fact a further centralization of administration. Not only did it exacerbate social problems, it eroded the local political organizations that were so dear to members of the House. Representative Chet Holifield (D-CA), an extremely shrewd observer of the political consequences of administrative centralization, explained the difficulty to the Executive and Legislative Reorganization Subcommittee of the Committee on Government Operations in October 1966:

I can see where we are fixing it up so some of the local politicians will really fight over [creative federalism], like they are fighting in Los Angeles County now over the poverty funds, between the city and the county and the so-called poverty agency; and it was at least thought by some people that the confusion and delay, because of this fighting, brought about the desperate situation that caused [rioting in] Watts. So this [creative federalism] is an invitation for shifting around of agencies within the State, and thereby shifting moneys to people other than the people that were dealt with in the first instance.

The administrative nightmares only became more serious as the various federal programs grew and proliferated. As Peri Arnold's *Making the Managerial Presidency* explains, these difficulties were centered in the administrative heart of the Great Society, the Office of Economic Opportunity. Consequently, in late 1966 President Johnson created a select Task Force on Government Organization, chaired by Ben Heineman. It was to be equal in stature to the Brownlow and Hoover commissions. Although Johnson did not set the agenda of the group, the best history of its operation, Emmette S. Redford and Marlan Blissett's *Organizing the Executive Branch*, notes that he "did ask them to take up out of order the question of what should be done about OEO."

**Giving the President Control.** In fact, Redford and Blissett report that, according to Heineman himself, President Johnson "couldn't have been more interested" in the commission's report. Nevertheless it was embargoed, because it was regarded as politically sensitive in the extreme. In particular, it attempted to plan an executive branch structure that would give the President effective control of administration at the field level. Early in its deliberations, Wallace Sayre explained the difficulties faced by the Great Society to the commission. In the first place, regional coordination of the executive branch organization down to the field level was more difficult — administratively and politically — than the problems the President experienced in coordinating agencies in Washington. The Heineman commission knew full well how difficult that was; one of its reports mentions, and deplores, the tendency of individual bureaus to make deals with individual congressional committees to protect special, local interests at the expense of the national interest as determined by Congress and the President. In other words, administration had been centralized in autonomous bureaus below the level of the President and the Departments.

This, however, was not even half the problem of presidential administration, because, besides regional coordination, there was the problem of authoritative relations between the regional executive organization and the state and local authorities who were independently elected, such as mayors and governors. The reason for this difficulty goes to the very heart of bureaucratic politics in a constitutional order like ours: There is no such thing as a hierarchy of elected officials, because each representative is beholden above all to his own electorate. In this sense, a representative democracy like ours is constitutionally antibureaucratic.

**Confirming Tocqueville's Observation.** The Heineman commission's recommendations for strengthening presidential control of central administration were lame: another layer of national administration between the President and the regions and a consolidation of existing departments into six superdepartments. These are not necessarily poor recommendations, to be sure, but they certainly are not solutions. They are not, because centralized administration is problematic, a problem that cannot be solved. Alexis de Tocqueville once observed that a "central power, however enlightened and wise one imagines it to be, can never alone see all the details of the life of a great nation. . . . [S]uch a task exceeds human strength." Nothing confirms Tocqueville's wisdom better than the experience of the past twenty years of American politics. Therefore, it is remarkable that President Johnson, the man most responsible for centralization of administration in the U.S., recognized how poorly administered the nation was and tried to correct it.

In its fundamental outlook as in its proposals, the Heineman commission followed in the footsteps of previous commissions on executive branch reorganization — notably the

Brownlow and first Hoover commissions — by presupposing that administration is properly an executive function and that excellence in administration is a function of executive unity. However, precisely the problems for which the commission was convened bred doubts in the Congress of the executive's capacity to administer. As indicated above, Congress was already toying with the possibilities of administering the Great Society itself as early as 1966. The election of a Republican President in 1972 only encouraged this tendency. The regulatory revolution was in fact the critical turning point in Congress's drive for administrative authority.

## **POSTINDUSTRIALISM**

The most striking formal or institutional feature of the agencies created by the regulatory revolution is their totalism. Sometimes their purviews were well deliberated, more often they were not; sometimes their regulatory purposes or goals were minutely defined, usually they were not; usually the new regulatory authority was created to satisfy the demand of some interest group, sometimes it was not. However, the definitive characteristic of the new agencies — as distinguished from all those created earlier — is that they have authority over everything; not just over all commerce, which was the case with the FTC, but indeed over the central government, over private social life in some cases, and over state and local governments. After the regulatory revolution was over, when Congress paused for a brief moment to survey what it had wrought, someone tried to explain to Senator Sam Nunn that this was "social regulation." He replied that description was inaccurate: "This is total regulation."

The typical social and political scientists of today persist in believing that the regulatory authority created in the 1970s is "social" — that its goals were social, not economic. However, as I have argued elsewhere, the goal of all prerevolutionary regulation, to the extent that it was constitutional, was social and not economic. Whether one considers the Interstate Commerce Commission, the Securities and Exchange Commission, or the Small Business Administration, Congress believed that there had been what is today called a "market failure" to produce certain social and/or political goods. The ICC was designed to preserve the national consensus for national economic development. The Securities and Exchange Commission was designed to preserve the work ethic. The SBA was designed to cultivate small town life, or what are today called bourgeois values. The free market — that is the American commercial system at its best — is not very good at producing such sociopolitical goods, because it is founded upon them. Prerevolutionary regulation, therefore, was intended to preserve the free market system from its own excesses. Revolutionary regulation was not.

**Spiritual Maladies.** Rather, the new agencies were based on a belief that the U.S. commercial system and the society that supports it are fundamentally flawed. The problem with the system was not supposed to be just a temporary one; it was not even supposed to be a permanent condition in a particular industry; nor was it just a temporary or even a permanent condition in the commercial system. The whole socioeconomic system was indicted by the regulatory revolutionaries, even the most fundamental moral and political principles of Americans. This attitude was conceived during the presidency of Lyndon Johnson, whose Great Society was to be free of the problems caused by "powerful technology." When subjected to the scrutiny of the intellectuals who comprised the many presidential commissions that designed the programs of the Great Society, America's real

problems turned out above all to be spiritual maladies like the alienation of man from nature and the depersonalization of human life in the postindustrial age.

Although Richard Nixon often seemed bent on reversing the Great Society and on revising the usual view of the Kennedy and Johnson Administrations as years of great accomplishment, he accepted the Great Society's critique of American industrialism. Consequently, at the same time that he was disparaging the mentality of the 1960s in which each problem was a crisis requiring a new spending program, Nixon urged the creation of the new regulatory institutions for a postindustrial age. As in the case of the Environmental Protection Agency and the Consumer Product Safety Commission, he claimed "It is literally now or never." In Nixon's view, the Democratic programs of the 20th century, including the Great Society, were designed for industrial society; for this purpose they were more or less adequate, but they were not sound policies for a postindustrial society, which differs in principle from industrial society. The importance of postindustrialism was central. So much so that in 1970, Nixon himself felt the coming of a postindustrial society to be a dominant social reality.

**Intellectual Fashion.** Postindustrialism was the intellectual fashion during the Nixon presidency. The most influential proponent of postindustrialism, Daniel Bell, first formulated the notion in the pages of *The Public Interest* when the Great Society was at its peak and fully elaborated it in 1973 in his widely celebrated *Coming of Post-Industrial Society*. For Bell, the key features of postindustrial society were sociopolitical:

[If] one speculates on the shape of society forty or fifty years from now, it becomes clear that the "old" industrial order is passing and that a "new society" is indeed in the making. To speak rashly: if the dominant figures of the past hundred years have been the entrepreneur, the businessman, and the industrial executive, the "new men" are the scientists, the mathematicians, the economists, and the engineers of the new computer technology. . . . The leadership of the new society will rest, [declaimed Bell in the pages of *The Public Interest* in 1970] not with businessmen or corporations as we know them (for a good deal of production will have been routinized), but with the research corporation, the industrial laboratories, the experimental stations, and the universities. In fact, the skeletal structure of the new society is already visible.

The great difference between intellectuals like Bell and the politicians who believed in postindustrialism was in their belief that future social realities would determine political realities; in particular, Bell believed that postindustrial society would have little choice but to pass political power "from legislative and parliamentary bodies to the executive." Bell could not have been more in error.

Belief in postindustrialism led to bureaucratization, but it did not lead to aggrandizement of the executive as against the legislative. Rather it led to a battle between the legislative and the executive for control of the bureaucracy. Politicians, especially Richard Nixon, understood this very well as they contemplated the new institutions for the postindustrial era.

And in other respects, Richard Nixon seems to have reflected more deeply on the meaning of postindustrialism than Bell (or other intellectuals). For Nixon, the

environmental issue went deeper than the pollution of air, water, and land, and deeper than the inherent difficulties of industrial society. It subsumed even the issue of man's relation to nature. For example, the fundamental cause of pollution, Nixon maintained in a 1970 speech, was "our failure to perceive the environment as a totality and to understand and to recognize the fundamental interdependence of all its parts, including man himself." To Nixon, the differences were striking: postindustrial society was not driven by material necessities, but by human choices (and therefore by ideology and information); economic growth and technology — objects of hope in the past — were problematic for the postindustrialist; the postindustrialist finds himself "rich in goods, but ragged in spirit." The crucial distinction, however, was this: the problems characteristic of postindustrial society were caused either by technological solutions to economic problems or, more often, by governmental solutions to industrial society's problems.

**Creating Institutions of the Future.** In Nixon's estimation, this analysis of postindustrialism did not point the to moderation of the citizens' expectations from government and technology as a solution. Nor did he favor policies of inner enrichment and spiritual growth. Rather, he pushed the reformation of the institutions of industrial society and the creation of "the institutions of the future." Since the institutions of the future were going to be created, he wanted to make sure they were created his way. For this reason, Nixon was a leading regulatory revolutionary.

As the ideology of the regulatory revolution, postindustrialism reflected the end of New Deal liberalism without positing a new political program. Postindustrialism is a form of historicism; it looks to the supposed passing age, the industrial age, but cannot imagine any central characteristics of the new age, except that it comes after industrialism. In other words, were it not for the fact that it inspired so much new regulation, postindustrialism could be regarded as merely an intellectual fad. Indeed, when the strategic and political importance of industrial production was rediscovered sometime around 1977, all the talk about the problems of production being solved and the "postscarcity" economy ceased. A new industrial policy was what was said to be necessary!

In sum: The regulatory revolution took place in an atmosphere of deep suspicion of, bordering on hostility to, modern American society. I call this atmosphere postindustrialism. It might also be called postliberalism, because it is the ideology bred by the despair consequent to the total collapse of the welfare state liberalism of the Great Society, centrally administered social programs, and a Keynesian economy, all presided over by a superpowerful executive.

## **THE NEW BUREAUCRATIC STATE AS EPITOMIZED BY EPA**

The truly spectacular failures of the Great Society did not warn the American government away from bureaucratization. Tocqueville's wise judgment never took hold. Instead, American politicians tinkered with bureaucracy in hopes of making it work better. However, since bureaucracy does not work, tinkering with it just made government worse — and many people more and more angry. Nowhere was the new regulatory politics more in public evidence than at the Environmental Protection Agency (EPA), the first agency created by the regulatory revolution, which now exemplifies the disastrous political and governmental consequences of trying to make bureaucracy work.

**Impossibility of Civil Enforcement.** Bureaucratic environmental protection proved to be vastly more difficult than was expected by Congress, the President, or environmentalists. During the first years of the EPA, the failure of the bureaucracy to produce any of the desired environmental effects was attributed to inexperience. By 1972, as despair over the feasibility of central administration of antipollution programs mounted, more punitive measures were demanded. "Traditionally, pollution has been regarded as a minor offense, somewhat akin to a parking violation. . .," said one leading environmentalist in 1973, "only within the past four years has concerted attention been given to the use of criminal sanctions as a means of abating pollution." In fact, the same source continued, only after 1972, when "the overwhelming administrative burden" associated with clean water legislation made civil enforcement impossible, did the EPA begin to give really serious attention to criminal enforcement.

Not so incidentally, 1973 was the year in which organized criminals became heavily involved. By 1978, James W. Moorman, Assistant Attorney General for Land and Natural Resources in the Carter Administration, had to confess that civil and administrative proceedings would not ever be adequate to the environmental problems. Writing in *Land and Natural Resources Division Journal*, he explained the impossibility of bureaucratic regulation of the environment:

Indeed, the pollution control enforcement responsibilities of the Environmental Protection Agency and the Department of Justice are monumental. EPA has identified 22,000 major stationary sources of air pollution. Of those 22,000, a large, but unknown number are not in compliance. . . .

EPA. . . [has] issued approximately 45,000 permits under the water act. A large, but unknown number of the permittees are not complying with the terms of those permits.

EPA has responsibility for more than 30,000 registered pesticides. An unknown number of registrants are in violation of various provisions of the pesticide control statutes.

**Turning Toward Criminal Penalties.** Policing activities of polluters and registrants on this scale is very difficult. In addition, there are other enforcement problems: numerous unpermitted discharges; unknown numbers of false reports and failures to report; thousands of automobiles with jimmied pollution control devices; numerous sales of unregistered or mislabeled pesticides. Soon to be added to these problems will be various enforcement problems under the Toxic Substances Control Act and the Resource Control and Recovery Act. Clearly the EPA and the Department of Justice cannot deal with these enforcement problems satisfactorily in the absence of widespread voluntary compliance.

The only hope — given the literal impossibility of enforcing the law — was the use of criminal penalties; even the stiffest civil fines were inadequate to deter large-scale polluters and were ruinous to smaller polluters. Accordingly, the Carter Administration increased the use of criminal enforcement, and the Reagan Administration increased it much more. In other words, as the administrative problems of policing the environment from Washington became more and more obvious, environmental protectors became more angry and punitive.

**Arming the EPA.** There was an unanticipated difficulty with criminal enforcement. Increasingly it brought organized criminals into the pollutant disposal business. Congressional hearings in May 1981 revealed that criminal gangs were already involved in the toxic waste disposal and treatment industry by 1973, because they were even less scrupulous about the environment than were corporations. In some parts of the country, these gangs divided up the toxic waste disposal business among themselves, or where they could not, engaged in armed warfare. "Midnight dumping," taking a tank truck full of toxics for a drive on a country road with the spigot open, became a problem. EPA agents were murdered. By the late 1970s or early 1980s, the warfare over pollution abatement became so rough that EPA's bureaucrats had to be armed.

Yet the pollution of air, water, and land did not seem to be lessening significantly.

Nonetheless, stricter enforcement, including criminal enforcement, of clean air, land, and water laws was not very popular in the nation's capital in the late 1970s for at least three reasons. First was the possibility — noted by Senator William Bradley (D-NJ) in early 1979 — that the criminalization of toxic waste disposal itself caused even worse pollution of those areas, notably New Jersey and northern Illinois, where criminal waste disposers operated. Furthermore, in the late 1970s "stagflation" was raging, and the slowing of economic growth and technical innovation in the U.S. was widely attributed — for example, by Senators Lloyd Bentsen (D-TX) and Edmund Muskie (D-ME) — to the burdens of regulation, especially environmental regulation. Environmentalism and postindustrialism had now, definitely, run their course. Third, the excesses of federal spending were beginning to be questioned, and government-financed cleaning and containment of toxic dumps, which were thought to cost from \$18 billion to \$54 billion, seemed out of the question to even such ardent opponents of pollution as Senators Bradley and Muskie and Alan Simpson (R-WY). The consequence of these three lines of thought was Superfund, by which the producers of toxic wastes would finance the cleaning of the environment. It was this privately financed public works project that led to the vicious quarrels over environmental issues during the Reagan Administration.

**Attacking the EPA Head.** Superfund was established in December 1980 to clean up toxic waste dumps. The fund presented congressmen with an extraordinary opportunity to take political credit for government spending without increasing government spending or taxes on individual citizens. Just how extraordinary this fund was as a source of political patronage is indicated by the unusually mean-spirited and punitive politics that swirled around the EPA in the early days of the Reagan Administration, which were also the early days of the Superfund. From the moment the new Reagan EPA Administrator arrived in Washington, Congressmen began to threaten her with deprivation of liberty. Before Anne Gorsuch Burford was confirmed, James J. Howard (D-NJ), the Chairman of the House Public Works and Transportation Committee, viciously berated her for allowing his political opponent, whom he had defeated months before Burford was even considered for the position at EPA, to take credit for an EPA construction grant in his district. Perhaps Howard was merely trying to impress upon her what he thought was really important, but less than a week after she arrived at EPA a federal judge tried to make a similar impression: "I don't care if that lady just walked in there," thundered the judge when he heard the request [that EPA issue the standards governing effluents in water which a law had required of the agency five years before]. "If this order isn't followed she's going to jail."



Representative Elliott H. Levitas (D-GA) was just as plain about his intent to jail the lady when the EPA Administrator did not testify to his liking:

I remember before we made that decision of what to do, not only checking out the precedents on the inherent power of Congress to hold a person in contempt, but what would be done if that occurred. Who would go out and arrest Mrs. Burford? And where would she be incarcerated? I checked out the location of the old jail in the Capitol Building. I actually went and met with the Architect of the Capitol, and he took me around and showed me where they [the Capitol police] use[d] to hold prisoners.

**Democrats' Victim.** The critical occasion for the Democratic congressmen to satisfy their rage came when they believed that the EPA had postponed the announcement of a Superfund grant to clean up Stringfellow toxic dump in California until after the election. The postponement, they thought, prevented Governor Jerry Brown from taking credit for the grant during his campaign for the Senate against Republican Pete Wilson. Although the grant was relatively small — \$6 million out of a multibillion dollar fund — the anger of the Democrats was so great that they baited EPA Assistant Administrator for Solid Waste and Emergency Response Rita Lavelle into perjuring herself in her congressional testimony about her activities in "election tracking" Superfund grants for the Reagan Administration.

Moreover they tried, but failed, to induce EPA Administrator Gorsuch into perjury in July of 1982. When their plot to entrap her and send her to jail failed, the public record of the House Public Works Committee's hearings was altered by the Democrats to remove their leading questions, the "bait" for which Mrs. Gorsuch did not go. Committee staff was fired, Republican members of the committee held the moral high ground for a few days, but no one has ever been able to get a transcript of the original hearings.

Clearly these Democrats regarded the Superfund dollars as their own and were willing to falsify the public record and send Burford to jail to hold on to them. Indeed, years after Burford resigned, the congressionally mandated special prosecutor was still pursuing criminal charges against the Justice Department official who, Congress thought, knew about the postponement of the announcement. The war over the administration of the environment came to a head constitutionally in *In re Olsen* (1988), the special prosecutor case.

**From High Morals to Pork Barrel.** These congressmen's motive was clear. In the words of Congressman John Dingell (D-MI), "You know I'm not after you [Administrator Gorsuch]. You're just in the way. What you need to do is to figure out who your friends are — whether they're up here [in Congress], or at the other end of Pennsylvania Avenue."

Thus in a little over a decade, the high morals of environmentalism, which aimed to cure the excesses of industrial society, had degenerated into a quarrel over the pork barrel that bordered on despotism.

The EPA became the center of vicious political battles, in which not only citizens' fortunes and honor but also their liberty were at stake in 1980-1983, because centralization of administration, with its utopian expectations of government, had bred an ill temper in American government. The Reagan Administration lost at every turn in its battle over the

EPA, right down to the *Olsen* case, in which the Administration's conservative Chief Justice ruled against them on constitutional grounds.

In recent times, the EPA has been in the forefront in initiating "negotiated regulations." In this process, the regulated are selected by the EPA to sit down with the regulators to negotiate what the regulations should be. Congress has encouraged this process, even though such a process is a radical deauthorization of government, in which private parties make administrative law for themselves and their competitors. This is the latest development in what the public choice theorists call "rent seeking," the use of government regulatory authority for competitive advantage, but it is an especially egregious instance because government and private interests deliberately permit the exercise of public authority by a private interest.

The story of EPA is extraordinary, but it is also typical in the sense that it illustrates the forces at work throughout the regulatory apparatus. From this story can be seen something that even Tocqueville did not: when humans arrogate authority to themselves, authority, for the exercise of which nature has not given them the moral and intellectual capacity, they are not always chastened by their failures; sometimes they become irrationally angry, blame others for their natural incapacity, and deprive them of their liberty. In short, there are real dangers to free government and a free society in the new politics of total regulation.

## THE REGULATORY SYSTEM AS NATIONAL "MACHINE"

This story also illustrates how deeply ingrained centralized administration is in our system. Anyone who supposes that the typical problems of bureaucratization are stagnation, arbitrariness, and impersonality really does not understand administration. The real problem is a violent government, one that habitually rules by threatening the liberty of its political opponents.

Generally, the set of agencies with society-wide, "total" regulatory authority, which was intended to correct all the supposed evils of industrial democracy, cannot perform the functions they were intended to perform. Everyone knows this now. Even the left has been willing to admit, as does Lester B. Lave in the Brookings Institution's *The Strategy of Social Regulation*, "Social regulation is in trouble, not because it is too costly, but because it is ineffective in accomplishing social goals." So the regulatory agencies have been converted by Congress into instruments of local administration. Congressmen are able to get favors — exceptions to the usual course of regulations — for the folks back home from these agencies, which stand them in good stead on election day.

Some, notably those of the "public choice" school like Robert E. McCormick, might believe that this is nothing but "machine politics" played out on a national scale. It is true that most of the new regulation amounts to favoritism, at best. However, the politics of private and parochial favoritism, when played out on a national scale, has all the disadvantages of a local machine — graft, violence, nepotism, inefficiency — with none of the advantages — democratic responsiveness, personality, initiative. And this machine will prove every bit as difficult to dismantle as Tammany Hall.

## **WHAT CAN BE DONE?**

Critics of the left and the right have concluded that the record of the Reagan Administration proves that bureaucracy is here to stay. Indeed, the question today, at least as much as it was 150 years ago for Tocqueville, is still: Can administration be decentralized? What can we learn from the record of the Reagan Administration?

### **The Record of the Reagan Administration**

The "Reagan Revolution" is defined, if at all, by the nation's recognition that the reigning left-liberal establishment has become ruinous to American life. Ronald Reagan expressed this with admirable clarity and precision throughout his 1980 campaign against Jimmy Carter by declaring that "Government is not the solution; government is the problem." Intellectuals of the left and the right interpret Reagan's memorable aphorism as "populistic" and "anti-government," but clearly Reagan meant that government need not be a problem to the American people and that, if he were in office, it would cease being a further problem and in that way start being a solution. Surely, that is what he has done. Yet Carter's Administration actually did more to dismantle regulatory authority than did Reagan's.

James Gattuso, The Heritage Foundation's regulation expert, has pointed out that the Reagan Administration could not accomplish much deregulation insofar as that would have required the cooperation of Congress. Christopher DeMuth, Gattuso's counterpart at the American Enterprise Institute, goes further. He claims that, after the profoundly troubling battle over Anne Burford's administration at EPA, the Reagan Administration was demoralized and did not expect cooperation in reforming the organic legislation of the regulatory agencies. Yet the fight over Burford had much more to do with regulatory relief than with deregulation. That is, EPA's organic legislation was not the issue at stake, only the issue of administrative responsiveness at EPA: Would EPA respond to a subcommittee chairman or to someone "at the other end of Pennsylvania Avenue"?

**Providing New Patronage.** Contrary to what DeMuth claims, this delimitation of the regulatory issues was the fault of the Reagan Administration, not the Congress, because from the beginning of its tenure, the Reagan Administration pressed harder for regulatory relief than for deregulation. In particular, Vice President George Bush, as the head of President Reagan's task force on regulatory relief, pushed hard to relieve the burden of regulation upon particular corporations or locales, even upon the economy as a whole, but did little to reduce or delimit regulatory authority by law. So the administration played Congress's game; it went head-to-head with Congress in providing the new patronage, regulatory relief.

By pursuing regulatory relief, not deregulation, the Reagan Administration tried to avoid a legislative fight with Congress. But because Congress is at least as interested in the administration of regulation as it is in regulatory authority, the Administration had a fight anyway. Moreover, it was a dirty, backroom brawl, because fights over administration are always more petty and personal than those over policy. The late Wilbur Cohen, the grand old man of New Deal administration, tried to explain this to Congress as early as 1965, when the centralized administration of the Great Society was being designed:

In my 30 years of working on [federal] . . . programs, I have been involved in a great many differences of opinion and controversies on

substantive issues [between] members of Congress, State agencies, localities [and] professional staff. . . I have found that no matter how strong the issues were, they could be contained very easily after Congress made the decision — with one exception, and that is. . . administrative organization.

I know of no issue that I have worked with over the years in which people hold their enmities or grudges or what they call matters of principle when they are arguing, longer and stronger, [than] where a responsibility ought to be administratively organized.

Why bureaucratic politics, which is commonly believed to be “above politics and deals,” is in fact characterized by vengefulness, lust for domination, and personal pettiness is a long story for another place. Suffice it to say here that the Reagan Administration (and now the Bush Administration) should not have preferred administrative battle to open, partisan, ideological, that is, political, battle over the laws that the issues of deregulation pose.

Within the limits set to it by its choice to engage in bureaucratic politics, the Reagan Administration has been very successful. Not only has it provided relief for individual victims of regulation, it has institutionalized regulatory relief by its creation of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget. OIRA provides continuous regulatory relief by subjecting new regulations to cost-benefit standards. At the least, this procedure forces bureaucrats — and, therefore, congressmen — to think twice about a new regulation. Moreover, there are few things more irritating than cost-benefit standards to the proponents of the current regulatory system. This procedure, however enlightened it may be for the future, can do little to curtail the extant regulatory burden. Moreover, it is doubtful that it would survive in a Democratic administration.

I would summarize Ronald Reagan’s record on regulation as follows: Short-term, economic benefits were maximized at the expense of long-term, social and political benefits.

### **The Bush Administration**

Can more be expected from the next administration? Clearly, up to now, George Bush has preferred administrative to political battle over regulatory issues. Moreover, because they lost more than their share of backroom brawls over the EPA (and other agencies), the Reagan-Bush regulatory team also lost the big political battle in the open. Bush’s election campaign never defended his outstanding record as a provider of regulatory relief, although Michael Dukakis allowed ample opportunity, but rather, it vied with the Democrats over who would increase the burdens of regulation more. For this reason, we cannot expect much change in regulatory policy or administration in the next four years.

Rarely does government act wisely, when it is not in its interest to do so. However, the crowbar of events sometimes forces reforms. In the past, as Martha Derthick and Paul J. Quirk have shown in their *Politics of Deregulation*, deregulation came because American politicians could see it dragging down the American economy, if not the American people (and also because they believed that regulation was merely benefiting some one or few special interests, like the airlines). Is this likely to happen again?

**Lesson from Europe.** The heavily regulated and heavily taxed economies of Europe, which were able to thrive while America lumbered along under the burdens of stagflation in the late 1970s and early 1980s, are now revealing their weakness: “Eurosklerosis.” A

re-regulation of America, which now seems to threaten, might bring the American government to realize the need for limited government.

More likely, I suggest, is continuance of the current, quite successful policies — by which short-term, economic benefits are maximized at the expense of long-term, social and political benefits. As suggested in the history of the EPA, the long-term effects of this course are quite pernicious: when government deals entirely on the basis of private, economic interest, sooner or later the governed come to regard government itself as just one more interest group. Government “deauthorizes” itself.

In that circumstance, genuine, internal improvement in the life of the nation is impossible.



# THE HERITAGE LECTURES

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The Regulatory  
Revolution and the  
New Bureaucratic  
State, Part II

*By John Adams Wettergreen*



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# THE REGULATORY REVOLUTION AND THE NEW BUREAUCRATIC STATE

## Part II

by John Adams Wettergreen

Last spring, in my first Bradley lecture, I described "the regulatory revolution" as the transformation of the regulatory system that took place between 1970 and 1974. Today I would like to sketch the kind of politics and government that was established by the revolution. As I do so, it also should be clear why the movement for deregulation fizzled out in the 1980s, although it was one of the three legs of the so-called Reagan Revolution of 1980, together with supply-side tax cuts and the defense buildup.

The most obvious signs of the regulatory revolution were enormous increases in the number of federal agencies regulating commerce and in the number of social, political, and commercial activities regulated by the federal government. Over 70 percent of the current regulatory apparatus is, in one way or another, the product of the regulatory revolution. In other words, the amount of change that occurred in those four years is unmatched in any period in American political history, including the New Deal and the progressive era. Although the economic costs versus the benefits of this change were enormous, I believed then, and still do today that the importance of the regulatory revolution was qualitative and political, not quantitative or material: There was a vast centralization of administration, a consequent weakening of the central government, an unlimited and unconstitutional extension of regulatory authority, consequent social and political debilitation, and a corruption of American public life.

**Fundamental Flaws.** Today I can explain, far more precisely and correctly than last spring, what the principle of and the condition for the regulatory revolution were. The principle may be called "postindustrialism." It is a conviction that the American commercial system is fundamentally flawed in ways that were unknown and unknowable to our forefathers. The condition of the regulatory revolution was the administrative failure of the Great Society's attempt to establish a bureaucratically administered welfare state. Once the principle and the condition are grasped, the difficulties faced by the Reagan Administration (or any administration that favors commercial freedom and limited government) will be plain.

### THE ADMINISTRATIVE COLLAPSE OF THE GREAT SOCIETY

Public choice theorists are correct: By using regulatory agencies, the advocates of the Great Society compelled the private sector to pay for social programs that might otherwise

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have shown up "on-budget" as massive government outlays. But the political reality of the 1960s was that the advocates of the Great Society were nearly Utopian in their economic projections. In its early years, as was especially evident in the campaign of 1964, the Johnson Administration actually believed that there was a danger of massive surpluses in the late 1960s — if the domestic spending did not increase fast enough. To have to find a way to avoid government expenditures on social problems, as the regulatory revolutionaries did, was a confession of the bankruptcy of the Great Society and of Keynesian economics on which it was based.

**Threats to the Welfare State.** In fact, the first signs of the Great Society's fiscal and monetary problems had already begun to show in mid-1966, when Congress sought greater power, as against the President, to control inflation; indeed, in 1966 the Employment Act of 1946 had to be amended to allow the greater inflation that Keynesian theory held to be necessary for the sake of increasing employment; even that early, inflation, unemployment, and slow economic growth threatened to sap public support for the Great Society.

Nevertheless, the welfare state's really serious problems of public finance and its threats to the economic growth (that supported welfare programs) — the "stagflation" of the 1970s and the massive deficits of the 1980s — took a decade to develop fully and become obvious to the people and their representatives.

**Centralizing Administration.** Even before the difficulties of financing the welfare state began to appear, grave administrative difficulties and, therefore, political problems with the Great Society had emerged. These are all but forgotten today, but they were so grave that, in the end, President Johnson tried to cover them up. In large part, he succeeded even though by 1965 leading poverty warriors understood, as Charles Murray now has shown in *Losing Ground*, "Progress stopped coincidentally with the implementation of the Great Society's social welfare programs" and "increases in expenditures coincided with an end to progress." As soon as the elections of 1966 were over, the President and the congressional Democrats were willing to acknowledge some of these administrative problems among themselves and sometimes even in public, and they tried to do something about them. The result was called "creative federalism," which meant paying the states to cooperate in the administration of the Great Society's social welfare programs.

Creative federalism was in fact a further centralization of administration. Not only did it exacerbate social problems, it eroded the local political organizations that were so dear to members of the House. Representative Chet Holifield (D-CA), an extremely shrewd observer of the political consequences of administrative centralization, explained the difficulty to the Executive and Legislative Reorganization Subcommittee of the Committee on Government Operations in October 1966:

I can see where we are fixing it up so some of the local politicians will really fight over [creative federalism], like they are fighting in Los Angeles County now over the poverty funds, between the city and the county and the so-called poverty agency; and it was at least thought by some people that the confusion and delay, because of this fighting, brought about the desperate situation that caused [rioting in] Watts. So this [creative federalism] is an invitation for shifting around of agencies within the State, and thereby shifting moneys to people other than the people that were dealt with in the first instance.

The administrative nightmares only became more serious as the various federal programs grew and proliferated. As Peri Arnold's *Making the Managerial Presidency* explains, these difficulties were centered in the administrative heart of the Great Society, the Office of Economic Opportunity. Consequently, in late 1966 President Johnson created a select Task Force on Government Organization, chaired by Ben Heineman. It was to be equal in stature to the Brownlow and Hoover commissions. Although Johnson did not set the agenda of the group, the best history of its operation, Emmette S. Redford and Marlan Blissett's *Organizing the Executive Branch*, notes that he "did ask them to take up out of order the question of what should be done about OEO."

**Giving the President Control.** In fact, Redford and Blissett report that, according to Heineman himself, President Johnson "couldn't have been more interested" in the commission's report. Nevertheless it was embargoed, because it was regarded as politically sensitive in the extreme. In particular, it attempted to plan an executive branch structure that would give the President effective control of administration at the field level. Early in its deliberations, Wallace Sayre explained the difficulties faced by the Great Society to the commission. In the first place, regional coordination of the executive branch organization down to the field level was more difficult — administratively and politically — than the problems the President experienced in coordinating agencies in Washington. The Heineman commission knew full well how difficult that was; one of its reports mentions, and deplores, the tendency of individual bureaus to make deals with individual congressional committees to protect special, local interests at the expense of the national interest as determined by Congress and the President. In other words, administration had been centralized in autonomous bureaus below the level of the President and the Departments.

This, however, was not even half the problem of presidential administration, because, besides regional coordination, there was the problem of authoritative relations between the regional executive organization and the state and local authorities who were independently elected, such as mayors and governors. The reason for this difficulty goes to the very heart of bureaucratic politics in a constitutional order like ours: There is no such thing as a hierarchy of elected officials, because each representative is beholden above all to his own electorate. In this sense, a representative democracy like ours is constitutionally antibureaucratic.

**Confirming Tocqueville's Observation.** The Heineman commission's recommendations for strengthening presidential control of central administration were lame: another layer of national administration between the President and the regions and a consolidation of existing departments into six superdepartments. These are not necessarily poor recommendations, to be sure, but they certainly are not solutions. They are not, because centralized administration is problematic, a problem that cannot be solved. Alexis de Tocqueville once observed that a "central power, however enlightened and wise one imagines it to be, can never alone see all the details of the life of a great nation. . . . [S]uch a task exceeds human strength." Nothing confirms Tocqueville's wisdom better than the experience of the past twenty years of American politics. Therefore, it is remarkable that President Johnson, the man most responsible for centralization of administration in the U.S., recognized how poorly administered the nation was and tried to correct it.

In its fundamental outlook as in its proposals, the Heineman commission followed in the footsteps of previous commissions on executive branch reorganization — notably the

Brownlow and first Hoover commissions — by presupposing that administration is properly an executive function and that excellence in administration is a function of executive unity. However, precisely the problems for which the commission was convened bred doubts in the Congress of the executive's capacity to administer. As indicated above, Congress was already toying with the possibilities of administering the Great Society itself as early as 1966. The election of a Republican President in 1972 only encouraged this tendency. The regulatory revolution was in fact the critical turning point in Congress's drive for administrative authority.

## **POSTINDUSTRIALISM**

The most striking formal or institutional feature of the agencies created by the regulatory revolution is their totalism. Sometimes their purviews were well deliberated, more often they were not; sometimes their regulatory purposes or goals were minutely defined, usually they were not; usually the new regulatory authority was created to satisfy the demand of some interest group, sometimes it was not. However, the definitive characteristic of the new agencies — as distinguished from all those created earlier — is that they have authority over everything; not just over all commerce, which was the case with the FTC, but indeed over the central government, over private social life in some cases, and over state and local governments. After the regulatory revolution was over, when Congress paused for a brief moment to survey what it had wrought, someone tried to explain to Senator Sam Nunn that this was "social regulation." He replied that description was inaccurate: "This is total regulation."

The typical social and political scientists of today persist in believing that the regulatory authority created in the 1970s is "social" — that its goals were social, not economic. However, as I have argued elsewhere, the goal of all prerevolutionary regulation, to the extent that it was constitutional, was social and not economic. Whether one considers the Interstate Commerce Commission, the Securities and Exchange Commission, or the Small Business Administration, Congress believed that there had been what is today called a "market failure" to produce certain social and/or political goods. The ICC was designed to preserve the national consensus for national economic development. The Securities and Exchange Commission was designed to preserve the work ethic. The SBA was designed to cultivate small town life, or what are today called bourgeois values. The free market — that is the American commercial system at its best — is not very good at producing such sociopolitical goods, because it is founded upon them. Prerevolutionary regulation, therefore, was intended to preserve the free market system from its own excesses. Revolutionary regulation was not.

**Spiritual Maladies.** Rather, the new agencies were based on a belief that the U.S. commercial system and the society that supports it are fundamentally flawed. The problem with the system was not supposed to be just a temporary one; it was not even supposed to be a permanent condition in a particular industry; nor was it just a temporary or even a permanent condition in the commercial system. The whole socioeconomic system was indicted by the regulatory revolutionaries, even the most fundamental moral and political principles of Americans. This attitude was conceived during the presidency of Lyndon Johnson, whose Great Society was to be free of the problems caused by "powerful technology." When subjected to the scrutiny of the intellectuals who comprised the many presidential commissions that designed the programs of the Great Society, America's real

problems turned out above all to be spiritual maladies like the alienation of man from nature and the depersonalization of human life in the postindustrial age.

Although Richard Nixon often seemed bent on reversing the Great Society and on revising the usual view of the Kennedy and Johnson Administrations as years of great accomplishment, he accepted the Great Society's critique of American industrialism. Consequently, at the same time that he was disparaging the mentality of the 1960s in which each problem was a crisis requiring a new spending program, Nixon urged the creation of the new regulatory institutions for a postindustrial age. As in the case of the Environmental Protection Agency and the Consumer Product Safety Commission, he claimed "It is literally now or never." In Nixon's view, the Democratic programs of the 20th century, including the Great Society, were designed for industrial society; for this purpose they were more or less adequate, but they were not sound policies for a postindustrial society, which differs in principle from industrial society. The importance of postindustrialism was central. So much so that in 1970, Nixon himself felt the coming of a postindustrial society to be a dominant social reality.

**Intellectual Fashion.** Postindustrialism was the intellectual fashion during the Nixon presidency. The most influential proponent of postindustrialism, Daniel Bell, first formulated the notion in the pages of *The Public Interest* when the Great Society was at its peak and fully elaborated it in 1973 in his widely celebrated *Coming of Post-Industrial Society*. For Bell, the key features of postindustrial society were sociopolitical:

[If] one speculates on the shape of society forty or fifty years from now, it becomes clear that the "old" industrial order is passing and that a "new society" is indeed in the making. To speak rashly: if the dominant figures of the past hundred years have been the entrepreneur, the businessman, and the industrial executive, the "new men" are the scientists, the mathematicians, the economists, and the engineers of the new computer technology. . . . The leadership of the new society will rest, [declaimed Bell in the pages of *The Public Interest* in 1970] not with businessmen or corporations as we know them (for a good deal of production will have been routinized), but with the research corporation, the industrial laboratories, the experimental stations, and the universities. In fact, the skeletal structure of the new society is already visible.

The great difference between intellectuals like Bell and the politicians who believed in postindustrialism was in their belief that future social realities would determine political realities; in particular, Bell believed that postindustrial society would have little choice but to pass political power "from legislative and parliamentary bodies to the executive." Bell could not have been more in error.

Belief in postindustrialism led to bureaucratization, but it did not lead to aggrandizement of the executive as against the legislative. Rather it led to a battle between the legislative and the executive for control of the bureaucracy. Politicians, especially Richard Nixon, understood this very well as they contemplated the new institutions for the postindustrial era.

And in other respects, Richard Nixon seems to have reflected more deeply on the meaning of postindustrialism than Bell (or other intellectuals). For Nixon, the

environmental issue went deeper than the pollution of air, water, and land, and deeper than the inherent difficulties of industrial society. It subsumed even the issue of man's relation to nature. For example, the fundamental cause of pollution, Nixon maintained in a 1970 speech, was "our failure to perceive the environment as a totality and to understand and to recognize the fundamental interdependence of all its parts, including man himself." To Nixon, the differences were striking: postindustrial society was not driven by material necessities, but by human choices (and therefore by ideology and information); economic growth and technology — objects of hope in the past — were problematic for the postindustrialist; the postindustrialist finds himself "rich in goods, but ragged in spirit." The crucial distinction, however, was this: the problems characteristic of postindustrial society were caused either by technological solutions to economic problems or, more often, by governmental solutions to industrial society's problems.

**Creating Institutions of the Future.** In Nixon's estimation, this analysis of postindustrialism did not point the way to moderation of the citizens' expectations from government and technology as a solution. Nor did he favor policies of inner enrichment and spiritual growth. Rather, he pushed the reformation of the institutions of industrial society and the creation of "the institutions of the future." Since the institutions of the future were going to be created, he wanted to make sure they were created his way. For this reason, Nixon was a leading regulatory revolutionary.

As the ideology of the regulatory revolution, postindustrialism reflected the end of New Deal liberalism without positing a new political program. Postindustrialism is a form of historicism; it looks to the supposed passing age, the industrial age, but cannot imagine any central characteristics of the new age, except that it comes after industrialism. In other words, were it not for the fact that it inspired so much new regulation, postindustrialism could be regarded as merely an intellectual fad. Indeed, when the strategic and political importance of industrial production was rediscovered sometime around 1977, all the talk about the problems of production being solved and the "postscarcity" economy ceased. A new industrial policy was what was said to be necessary!

In sum: The regulatory revolution took place in an atmosphere of deep suspicion of, bordering on hostility to, modern American society. I call this atmosphere postindustrialism. It might also be called postliberalism, because it is the ideology bred by the despair consequent to the total collapse of the welfare state liberalism of the Great Society, centrally administered social programs, and a Keynesian economy, all presided over by a superpowerful executive.

## **THE NEW BUREAUCRATIC STATE AS EPITOMIZED BY EPA**

The truly spectacular failures of the Great Society did not warn the American government away from bureaucratization. Tocqueville's wise judgment never took hold. Instead, American politicians tinkered with bureaucracy in hopes of making it work better. However, since bureaucracy does not work, tinkering with it just made government worse — and many people more and more angry. Nowhere was the new regulatory politics more in public evidence than at the Environmental Protection Agency (EPA), the first agency created by the regulatory revolution, which now exemplifies the disastrous political and governmental consequences of trying to make bureaucracy work.

**Impossibility of Civil Enforcement.** Bureaucratic environmental protection proved to be vastly more difficult than was expected by Congress, the President, or environmentalists. During the first years of the EPA, the failure of the bureaucracy to produce any of the desired environmental effects was attributed to inexperience. By 1972, as despair over the feasibility of central administration of antipollution programs mounted, more punitive measures were demanded. "Traditionally, pollution has been regarded as a minor offense, somewhat akin to a parking violation. . .," said one leading environmentalist in 1973, "only within the past four years has concerted attention been given to the use of criminal sanctions as a means of abating pollution." In fact, the same source continued, only after 1972, when "the overwhelming administrative burden" associated with clean water legislation made civil enforcement impossible, did the EPA begin to give really serious attention to criminal enforcement.

Not so incidentally, 1973 was the year in which organized criminals became heavily involved. By 1978, James W. Moorman, Assistant Attorney General for Land and Natural Resources in the Carter Administration, had to confess that civil and administrative proceedings would not ever be adequate to the environmental problems. Writing in *Land and Natural Resources Division Journal*, he explained the impossibility of bureaucratic regulation of the environment:

Indeed, the pollution control enforcement responsibilities of the Environmental Protection Agency and the Department of Justice are monumental. EPA has identified 22,000 major stationary sources of air pollution. Of those 22,000, a large, but unknown number are not in compliance. . . .

EPA. . . [has] issued approximately 45,000 permits under the water act. A large, but unknown number of the permittees are not complying with the terms of those permits.

EPA has responsibility for more than 30,000 registered pesticides. An unknown number of registrants are in violation of various provisions of the pesticide control statutes.

**Turning Toward Criminal Penalties.** Policing activities of polluters and registrants on this scale is very difficult. In addition, there are other enforcement problems: numerous unpermitted discharges; unknown numbers of false reports and failures to report; thousands of automobiles with jimmied pollution control devices; numerous sales of unregistered or mislabeled pesticides. Soon to be added to these problems will be various enforcement problems under the Toxic Substances Control Act and the Resource Control and Recovery Act. Clearly the EPA and the Department of Justice cannot deal with these enforcement problems satisfactorily in the absence of widespread voluntary compliance.

The only hope — given the literal impossibility of enforcing the law — was the use of criminal penalties; even the stiffest civil fines were inadequate to deter large-scale polluters and were ruinous to smaller polluters. Accordingly, the Carter Administration increased the use of criminal enforcement, and the Reagan Administration increased it much more. In other words, as the administrative problems of policing the environment from Washington became more and more obvious, environmental protectors became more angry and punitive.

**Arming the EPA.** There was an unanticipated difficulty with criminal enforcement. Increasingly it brought organized criminals into the pollutant disposal business. Congressional hearings in May 1981 revealed that criminal gangs were already involved in the toxic waste disposal and treatment industry by 1973, because they were even less scrupulous about the environment than were corporations. In some parts of the country, these gangs divided up the toxic waste disposal business among themselves, or where they could not, engaged in armed warfare. "Midnight dumping," taking a tank truck full of toxics for a drive on a country road with the spigot open, became a problem. EPA agents were murdered. By the late 1970s or early 1980s, the warfare over pollution abatement became so rough that EPA's bureaucrats had to be armed.

Yet the pollution of air, water, and land did not seem to be lessening significantly.

Nonetheless, stricter enforcement, including criminal enforcement, of clean air, land, and water laws was not very popular in the nation's capital in the late 1970s for at least three reasons. First was the possibility — noted by Senator William Bradley (D-NJ) in early 1979 — that the criminalization of toxic waste disposal itself caused even worse pollution of those areas, notably New Jersey and northern Illinois, where criminal waste disposers operated. Furthermore, in the late 1970s "stagflation" was raging, and the slowing of economic growth and technical innovation in the U.S. was widely attributed — for example, by Senators Lloyd Bentsen (D-TX) and Edmund Muskie (D-ME) — to the burdens of regulation, especially environmental regulation. Environmentalism and postindustrialism had now, definitely, run their course. Third, the excesses of federal spending were beginning to be questioned, and government-financed cleaning and containment of toxic dumps, which were thought to cost from \$18 billion to \$54 billion, seemed out of the question to even such ardent opponents of pollution as Senators Bradley and Muskie and Alan Simpson (R-WY). The consequence of these three lines of thought was Superfund, by which the producers of toxic wastes would finance the cleaning of the environment. It was this privately financed public works project that led to the vicious quarrels over environmental issues during the Reagan Administration.

**Attacking the EPA Head.** Superfund was established in December 1980 to clean up toxic waste dumps. The fund presented congressmen with an extraordinary opportunity to take political credit for government spending without increasing government spending or taxes on individual citizens. Just how extraordinary this fund was as a source of political patronage is indicated by the unusually mean-spirited and punitive politics that swirled around the EPA in the early days of the Reagan Administration, which were also the early days of the Superfund. From the moment the new Reagan EPA Administrator arrived in Washington, Congressmen began to threaten her with deprivation of liberty. Before Anne Gorsuch Burford was confirmed, James J. Howard (D-NJ), the Chairman of the House Public Works and Transportation Committee, viciously berated her for allowing his political opponent, whom he had defeated months before Burford was even considered for the position at EPA, to take credit for an EPA construction grant in his district. Perhaps Howard was merely trying to impress upon her what he thought was really important, but less than a week after she arrived at EPA a federal judge tried to make a similar impression: "I don't care if that lady just walked in there," thundered the judge when he heard the request [that EPA issue the standards governing effluents in water which a law had required of the agency five years before]. "If this order isn't followed she's going to jail."

Representative Elliott H. Levitas (D-GA) was just as plain about his intent to jail the lady when the EPA Administrator did not testify to his liking:

I remember before we made that decision of what to do, not only checking out the precedents on the inherent power of Congress to hold a person in contempt, but what would be done if that occurred. Who would go out and arrest Mrs. Burford? And where would she be incarcerated? I checked out the location of the old jail in the Capitol Building. I actually went and met with the Architect of the Capitol, and he took me around and showed me where they [the Capitol police] use[d] to hold prisoners.

**Democrats' Victim.** The critical occasion for the Democratic congressmen to satisfy their rage came when they believed that the EPA had postponed the announcement of a Superfund grant to clean up Stringfellow toxic dump in California until after the election. The postponement, they thought, prevented Governor Jerry Brown from taking credit for the grant during his campaign for the Senate against Republican Pete Wilson. Although the grant was relatively small — \$6 million out of a multibillion dollar fund — the anger of the Democrats was so great that they baited EPA Assistant Administrator for Solid Waste and Emergency Response Rita Lavelle into perjuring herself in her congressional testimony about her activities in "election tracking" Superfund grants for the Reagan Administration.

Moreover they tried, but failed, to induce EPA Administrator Gorsuch into perjury in July of 1982. When their plot to entrap her and send her to jail failed, the public record of the House Public Works Committee's hearings was altered by the Democrats to remove their leading questions, the "bait" for which Mrs. Gorsuch did not go. Committee staff was fired, Republican members of the committee held the moral high ground for a few days, but no one has ever been able to get a transcript of the original hearings.

Clearly these Democrats regarded the Superfund dollars as their own and were willing to falsify the public record and send Burford to jail to hold on to them. Indeed, years after Burford resigned, the congressionally mandated special prosecutor was still pursuing criminal charges against the Justice Department official who, Congress thought, knew about the postponement of the announcement. The war over the administration of the environment came to a head constitutionally in *In re Olsen* (1988), the special prosecutor case.

**From High Morals to Pork Barrel.** These congressmen's motive was clear. In the words of Congressman John Dingell (D-MI), "You know I'm not after you [Administrator Gorsuch]. You're just in the way. What you need to do is to figure out who your friends are — whether they're up here [in Congress], or at the other end of Pennsylvania Avenue."

Thus in a little over a decade, the high morals of environmentalism, which aimed to cure the excesses of industrial society, had degenerated into a quarrel over the pork barrel that bordered on despotism.

The EPA became the center of vicious political battles, in which not only citizens' fortunes and honor but also their liberty were at stake in 1980-1983, because centralization of administration, with its utopian expectations of government, had bred an ill temper in American government. The Reagan Administration lost at every turn in its battle over the



EPA, right down to the *Olsen* case, in which the Administration's conservative Chief Justice ruled against them on constitutional grounds.

In recent times, the EPA has been in the forefront in initiating "negotiated regulations." In this process, the regulated are selected by the EPA to sit down with the regulators to negotiate what the regulations should be. Congress has encouraged this process, even though such a process is a radical deauthorization of government, in which private parties make administrative law for themselves and their competitors. This is the latest development in what the public choice theorists call "rent seeking," the use of government regulatory authority for competitive advantage, but it is an especially egregious instance because government and private interests deliberately permit the exercise of public authority by a private interest.

The story of EPA is extraordinary, but it is also typical in the sense that it illustrates the forces at work throughout the regulatory apparatus. From this story can be seen something that even Tocqueville did not: when humans arrogate authority to themselves, authority, for the exercise of which nature has not given them the moral and intellectual capacity, they are not always chastened by their failures; sometimes they become irrationally angry, blame others for their natural incapacity, and deprive them of their liberty. In short, there are real dangers to free government and a free society in the new politics of total regulation.

## THE REGULATORY SYSTEM AS NATIONAL "MACHINE"

This story also illustrates how deeply ingrained centralized administration is in our system. Anyone who supposes that the typical problems of bureaucratization are stagnation, arbitrariness, and impersonality really does not understand administration. The real problem is a violent government, one that habitually rules by threatening the liberty of its political opponents.

Generally, the set of agencies with society-wide, "total" regulatory authority, which was intended to correct all the supposed evils of industrial democracy, cannot perform the functions they were intended to perform. Everyone knows this now. Even the left has been willing to admit, as does Lester B. Lave in the Brookings Institution's *The Strategy of Social Regulation*, "Social regulation is in trouble, not because it is too costly, but because it is ineffective in accomplishing social goals." So the regulatory agencies have been converted by Congress into instruments of local administration. Congressmen are able to get favors — exceptions to the usual course of regulations — for the folks back home from these agencies, which stand them in good stead on election day.

Some, notably those of the "public choice" school like Robert E. McCormick, might believe that this is nothing but "machine politics" played out on a national scale. It is true that most of the new regulation amounts to favoritism, at best. However, the politics of private and parochial favoritism, when played out on a national scale, has all the disadvantages of a local machine — graft, violence, nepotism, inefficiency — with none of the advantages — democratic responsiveness, personality, initiative. And this machine will prove every bit as difficult to dismantle as Tammany Hall.

## **WHAT CAN BE DONE?**

Critics of the left and the right have concluded that the record of the Reagan Administration proves that bureaucracy is here to stay. Indeed, the question today, at least as much as it was 150 years ago for Tocqueville, is still: Can administration be decentralized? What can we learn from the record of the Reagan Administration?

### **The Record of the Reagan Administration**

The "Reagan Revolution" is defined, if at all, by the nation's recognition that the reigning left-liberal establishment has become ruinous to American life. Ronald Reagan expressed this with admirable clarity and precision throughout his 1980 campaign against Jimmy Carter by declaring that "Government is not the solution; government is the problem." Intellectuals of the left and the right interpret Reagan's memorable aphorism as "populistic" and "anti-government," but clearly Reagan meant that government need not be a problem to the American people and that, if he were in office, it would cease being a further problem and in that way start being a solution. Surely, that is what he has done. Yet Carter's Administration actually did more to dismantle regulatory authority than did Reagan's.

James Gattuso, The Heritage Foundation's regulation expert, has pointed out that the Reagan Administration could not accomplish much deregulation insofar as that would have required the cooperation of Congress. Christopher DeMuth, Gattuso's counterpart at the American Enterprise Institute, goes further. He claims that, after the profoundly troubling battle over Anne Burford's administration at EPA, the Reagan Administration was demoralized and did not expect cooperation in reforming the organic legislation of the regulatory agencies. Yet the fight over Burford had much more to do with regulatory relief than with deregulation. That is, EPA's organic legislation was not the issue at stake, only the issue of administrative responsiveness at EPA: Would EPA respond to a subcommittee chairman or to someone "at the other end of Pennsylvania Avenue"?

**Providing New Patronage.** Contrary to what DeMuth claims, this delimitation of the regulatory issues was the fault of the Reagan Administration, not the Congress, because from the beginning of its tenure, the Reagan Administration pressed harder for regulatory relief than for deregulation. In particular, Vice President George Bush, as the head of President Reagan's task force on regulatory relief, pushed hard to relieve the burden of regulation upon particular corporations or locales, even upon the economy as a whole, but did little to reduce or delimit regulatory authority by law. So the administration played Congress's game; it went head-to-head with Congress in providing the new patronage, regulatory relief.

By pursuing regulatory relief, not deregulation, the Reagan Administration tried to avoid a legislative fight with Congress. But because Congress is at least as interested in the administration of regulation as it is in regulatory authority, the Administration had a fight anyway. Moreover, it was a dirty, backroom brawl, because fights over administration are always more petty and personal than those over policy. The late Wilbur Cohen, the grand old man of New Deal administration, tried to explain this to Congress as early as 1965, when the centralized administration of the Great Society was being designed:

In my 30 years of working on [federal] . . . programs, I have been involved in a great many differences of opinion and controversies on

substantive issues [between] members of Congress, State agencies, localities [and] professional staff. . . . I have found that no matter how strong the issues were, they could be contained very easily after Congress made the decision — with one exception, and that is. . . administrative organization.

I know of no issue that I have worked with over the years in which people hold their enmities or grudges or what they call matters of principle when they are arguing, longer and stronger, [than] where a responsibility ought to be administratively organized.

Why bureaucratic politics, which is commonly believed to be “above politics and deals,” is in fact characterized by vengefulness, lust for domination, and personal pettiness is a long story for another place. Suffice it to say here that the Reagan Administration (and now the Bush Administration) should not have preferred administrative battle to open, partisan, ideological, that is, political, battle over the laws that the issues of deregulation pose.

Within the limits set to it by its choice to engage in bureaucratic politics, the Reagan Administration has been very successful. Not only has it provided relief for individual victims of regulation, it has institutionalized regulatory relief by its creation of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget. OIRA provides continuous regulatory relief by subjecting new regulations to cost-benefit standards. At the least, this procedure forces bureaucrats — and, therefore, congressmen — to think twice about a new regulation. Moreover, there are few things more irritating than cost-benefit standards to the proponents of the current regulatory system. This procedure, however enlightened it may be for the future, can do little to curtail the extant regulatory burden. Moreover, it is doubtful that it would survive in a Democratic administration.

I would summarize Ronald Reagan’s record on regulation as follows: Short-term, economic benefits were maximized at the expense of long-term, social and political benefits.

### **The Bush Administration**

Can more be expected from the next administration? Clearly, up to now, George Bush has preferred administrative to political battle over regulatory issues. Moreover, because they lost more than their share of backroom brawls over the EPA (and other agencies), the Reagan-Bush regulatory team also lost the big political battle in the open. Bush’s election campaign never defended his outstanding record as a provider of regulatory relief, although Michael Dukakis allowed ample opportunity, but rather, it vied with the Democrats over who would increase the burdens of regulation more. For this reason, we cannot expect much change in regulatory policy or administration in the next four years.

Rarely does government act wisely, when it is not in its interest to do so. However, the crowbar of events sometimes forces reforms. In the past, as Martha Derthick and Paul J. Quirk have shown in their *Politics of Deregulation*, deregulation came because American politicians could see it dragging down the American economy, if not the American people (and also because they believed that regulation was merely benefiting some one or few special interests, like the airlines). Is this likely to happen again?

**Lesson from Europe.** The heavily regulated and heavily taxed economies of Europe, which were able to thrive while America lumbered along under the burdens of stagflation in the late 1970s and early 1980s, are now revealing their weakness: “Eurosklerosis.” A

re-regulation of America, which now seems to threaten, might bring the American government to realize the need for limited government.

More likely, I suggest, is continuance of the current, quite successful policies — by which short-term, economic benefits are maximized at the expense of long-term, social and political benefits. As suggested in the history of the EPA, the long-term effects of this course are quite pernicious: when government deals entirely on the basis of private, economic interest, sooner or later the governed come to regard government itself as just one more interest group. Government “deauthorizes” itself.

In that circumstance, genuine, internal improvement in the life of the nation is impossible.

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