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THE CONGRESS AND REGULATION

I appreciate having the opportunity to speak before such a distinguished audience today.

Excessive regulation is a good subject for any politician to speak on. One gets a golden opportunity to take a slap at insensitive bureaucrats and intrusive government and generally take the side of motherhood and apple pie. I recently came across a book entitled How Washington Really Works (written by Charles Peters, editor of The Washington Monthly). It stated that U.S. Congressmen need these unresponsive regulators so that we can show our constituients how much we are on their side.

But, seriously, there is a real problem, one with no single cause, and one that is crying if not for a solution at least a series of responses.

One response lies with the regulators themselves and their boss, the President. Greater sensitivity to the burdens caused by specific regulations and greater attention to results rather than method are two steps that can and should be undertaken without direction from the Congress.

In many instances, it is desirable to focus on the more serious problems, rather than worrying about such things as the shape of toilet seats, which OSHA used to regulate. It is clear that when an agency, such as OSHA, can eliminate 1,000 regulations in one day that somewhere along the line the regulators went overboard.

In my view, the current administration has made some progress in promoting an improved attitude and approach, but there are simply too many regulators around for one President to keep things under control.

However, most of the possible responses as regards federal regulations lie with the Congress, which of course created the laws that have spawned the regulations.

I. LONG-TERM RESPONSES

The first thing that Congress can do is to start drafting laws more carefully, to resolve legislative questions during the consideration of legislation, and to stop making broad grants of legislative authority to regulatory agencies.

When the FTC was given the legislative authority to investigate "unfair and deceptive" trade practices with virtually no additional guidance, they were virtually handed a blank check. That abuses were going to result--such as the FTC trying to usurp the States' role in imposing quality controls in health care or regulating insurance--was

practically inevitable.

Many of the problems surrounding the FTC over the last six years could have been avoided had the statute provided more guidance and been more tightly drafted.

Reform in this area basically requires that we tackle some of the difficult issues which Congressmen, as politicians, would prefer to avoid. It also requires that more time be spent in the actual writing of laws, time that is already at a premium.

The second change Congress must make would compliment the first one. Namely, Congress must realize that it cannot possibly make all the policy decisions in the country. There must be a conscious decision to stop usurping State and local powers, and in fact, to allow greater and even considerable decentralization in policy-making.

The term States' rights got a bad name in the twenty years following World War II because it was used to defend racial discrimination. But the traditional concept behind this term refers simply to the decentralization of power. This is not only a valuable concept, but it is also one of the fundamental principles on which this nation was founded.

States' rights is a subject I frequently speak on at length. Recently, however, I ran across a quote which sums up my views quite

well. In a political speech in 1910, Governor Charles B. Aycock said the following: "A Democrat believes in order to be responsive to the quick demands of the people the government should be as close to the people as it is possible to bring it. A Democrat believes that when you have centralized your government and made it strong and put it far away from the people, that the great mass of people can't put their hands upon that government and enforce the will of the multitude."

To put it another way, if a public policy decision can be made in Raleigh rather than in Washington, then that is where it should be made, for the government that is closest to the people is most likely to be government of the people.

Now, there are clearly a number of areas where one national policy is necessary. But equally clearly, there are areas where one national policy is not necessary and usually not desirable and, in the last decade, the Congress has been moving into some of these areas.

At times, the Senate seems to become so involved in confusing issues that it would take the wisdom of Solomon to understand it. The pressure to legislate on so many topics is intense.

And, of course, one of the natural consequences of having too much to do is that work gets sloppy, and this brings us back to the first point--the need to write carefully and tightly drafted laws.

The two proposals are really indirect reforms. They do not deal directly with the regulatory process. Rather they are changes in the way Congress itself operates, changes that should help to reduce the number of regulatory difficulties that may arise in the future.

II. THE TWO-TIERED APPROACH

There are also ways in which the Congress can attack the problem of excessive or improper regulations directly. These include a two-tiered approach to regulations affecting business, sunset proposals, regulatory reform, the legislative veto, and Senator Bumpers' proposal to shift the burden of proof in court cases involving the validity of regulations to the government.

Earlier this month, the Congress completed final action on a bill which recognizes that small businesses and small organizations have greater difficulty in complying with federal regulations than larger concerns, mainly because it is harder for them to absorb the costs.

Under this bill, now Public Law 96-354, regulators would be required to consider the cost and other impacts of proposed rules on small businesses and other small organizations, alternative proposals and especially cheaper alternatives, as well as provide written justification for the choice of one proposal over a less burdensome or costly one.

One would almost think that this type of regulatory analysis would be routine. Yet, it took affirmative action by this President and this Congress to bring it about.

III. GENERAL REGULATORY REFORM

A second positive step the Congress can take is to pass the regulatory reform bill, S. 262.

S. 262 makes a number of positive changes in the Administrative Procedures Act to improve the rule-making progress. It requires a detailed regulatory analysis, one that goes beyond the scope of the new law I just mentioned. It also mandates the periodic review of regulations already in force, and makes changes in the treatment of administrative law judges--changes designed to improve their quality.

In addition, S. 262 would make an initial step in an area that is of especially great concern to me. It recognizes, to my knowledge for the first time, that there needs to be some separation of the investigative and litigative functions of an agency from the judicial functions. It does this by prohibiting employees of any agency who are investigative or litigative from either participating in judicial decision-making or from supervising the employees that do make judicial determinations.

Our Founding Fathers created a system of government with three distinct and separate branches--the legislative, the executive, and the judicial. They recognized that those who write the laws, those who enforce them, and those who make the legal judgments cannot be one and the same.

Unfortunately, with the regulatory agencies, this important distinction has been wiped out. The very same people that make policy then proceed to act as police, prosecutor, judge, and jury in regards to that policy.

This kind of situation is not only contrary to our system of government, but also violates all notions of fair play or justice.

I am not criticizing the regulators for this. But it is virtually impossible to expect any individual or group to be able to fulfill all these tasks in a fair and impartial manner.

As a member of the Senate Ethics Committee, I have a very personal knowledge in both the difficulties and dangers in combining these roles. The six of us who serve on that committee have been in effect instructed to play all those roles, which puts us in the very same position of FTC Commissioners and other regulators. And, to be frank, we have had considerable problems trying to do it. It is for this reason that I have been pushing a resolution to remove the role of the jury from the Ethics Committee when there is a need for a full-scale hearing, as

there was in the case of Senator Talmadge last year.

However, at least in the case of the Ethics Committee there is an effective court of last resort, namely the full Senate.

The recognition of the need for separation of powers calls for, in my opinion, two other solutions which are more controversial. One would restore some check over the legislative powers of regulatory agencies by giving Congress an effective legislative veto. The second would provide a check on their judicial power by granting the courts greater authority to review regulatory determinations.

IV. THE LEGISLATIVE VETO

The Congress has enacted about two hundred legislative vetos into law in various forms since the first veto provision was added to the Legislative Appropriations Act of 1932. Section 407 of that Act stated that executive orders relating to reorganization would become effective after 60 days unless a concurrent resolution of disapproval was disapproved by both houses.

Since that moment legislative vetos have been enacted with increasing frequency, in different forms, and on a wide variety of measures.

I do not see a legislative veto impeding the work of the executive branch or infringing on its authority. After all, Congress writes the laws. Since regulations designed to implement the law have the force of law, it is important for Congress to assure itself that regulations are accurately and properly written. It is also worth noting that Congress has an effective legislative veto under any circumstances, since it can deny the appropriations necessary to implement a regulation. The precedents for this are numerous--all one has to do is read any recent appropriations bill.

But, an effective government-wide legislative veto can establish an order to the progress by creating an explicit recognition that Congress has the responsibility to review regulations and by establishing the procedure for such review.

Nor do I believe that legislative vetos will be used hastily or in an irresponsible fashion. Just last Wednesday, the Senate debated whether to approve a House-passed resolution blocking the sale of uranium to India. The resolution was rejected, and the sale will take place.

The provisions that should be in a government-wide legislative veto provision now seem clear. Both houses of Congress should have to veto the regulations, recognizing that two houses were created for a purpose. There should also be a procedure to mandate floor

consideration and limit debate, coupled with a time limit--60 days is normally chosen--in which Congress must act. Taken together, these insure that Congress, if it is to act, must act in a timely fashion while insuring that a determined minority cannot prevent consideration of the matter.

V. THE DOCTRINE OF PRESUMED VALIDITY

The second step I would take is to end the presumption by the courts that an agency's regulations are valid. Currently, the courts will not overturn a regulation unless, to quote Section 7 of the Administrative Procedures Act, it is "found to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law." The practical effect of this language has been, for the most part, to insure that courts will not act.

The number of cases where the courts have claimed a limited ability to review regulations is legion. But, two decisions stand out.

In 1973, the Supreme Court in a decision involving ICC rates said: "Such decisions are not to be disturbed by the courts except without a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

More recently, the Eighth Circuit Court of Appeals, in a case involving Agriculture Department regulations relating to sale of barns wrote: "Agency officials are assumed to be capable of judging a particular controversy fairly on the basis of its own circumstances."

The leading case in this area is National Labor Relations Board v. Hearst Publishing Company, 322, U.S. (1944). There the Supreme Court held as follows: "Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgments of those whose duty is to administer the questioned statute.... But where the question is one of specific application of a broad statutory term in a proceeding which the agency administering the statute must determine it initially, the reviewing court's function is limited."

The doctrine of presumed validity cedes to a branch of government the Founding Father did not even conceive of a share of judicial power. Regulatory agencies have almost carte blanche authority to make judicial decisions and the courts, by precedent, rubber stamp them. When a court affirms the interpretation of a statute which it would not have adopted as an original matter, it abdicates one of its most important functions.

The effect of this is to make it virtually impossible for a large corporation or a State government to successfully challenge a regulation in court, and totally impossible for a small business or individual citizen to do so. The few successful challenges that have taken place have been successful only after considerable time and great expense has been incurred.

Last September, with my active support, the Senate passed an amendment by Senator Bumpers which would require that the preponderance of evidence show that a rule or regulation is valid before a court uphold it, and further, ordered the courts to decide all relevant questions of law. While I am not wedded to the specific language of that amendment, the approach is appropriate and a legislative change is needed in this area.

V. CONCLUSION

These proposals are not a panacea, and the difficulties that have arisen from over-regulations will not disappear overnight. In the long-term, the solution lies with a change in attitude among those in government, both in the Congress and in the executive agencies.

But, we do need immediate, and even drastic, responses from the Congress now. It is not enough to write the laws more carefully and delegate fewer powers even though, as I pointed out earlier, that is the ultimate source of the problem.

Theoretically, much of the problem could be solved if the Congress were to review all the existing statutes and repass them, this time making the mandate of each agency more specific and particular.

However, if time constraints alone did not rule this out, there is a serious practical difficulty. The broad grants of legislative power to agencies has already been particularized by the agencies themselves. These surrogates for Congress have spun out whole codes of regulations, all of which have the force of law. Each of these specifications has acquired its own constituency of support. In fact, we have the same situations with regulations that we have with the federal budget in which, as Senator Hollings pointed out, "every last dollar has a constituency somewhere."

The broad public pressure to reduce federal regulation, much like the broad pressure to reduce spending, frequently cannot stand up to the specific, strong pressures that often come into play when a specific item is in question.

And it is for this reason that I advocate these changes in law to allow the problem to be tackled directly. For better or worse, simple changes in attitude and an effort to do better in the future are important but not enough.

THANK YOU.