

## ARE WE AN OVER-REGULATED SOCIETY†

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We Americans have always had a love-hate relationship with our government. We want our government both to take care of us and to leave us strictly alone. When things are going well with us we want to take the credit, and when things are going ill, we want the government to take the blame. We quarrel vigorously about the correct allocation of powers among and between branches of government, and among and between the federal government, state and local governments. Despite our ambivalence, we have seeming agreement that the government is suffocating us with paper and that our inalienable liberties, our productivity and our creativity, are being smothered under regulations imposed on us by faceless bureaucrats. We are over-lawyered, over-burdened, and over-regulated. Is our perception that we are over-regulated imagined or real? What are the processes of government that lead to those perceptions?

One should not linger over the question whether we are over-papered. We are. In drafting forms, instructions, rules and regulations for a pluralistic and diverse nation, the federal government foists thousands of pages of material on people who can make little or no sense of it in the circumstances in which they are situated. Everyone has a favorite horror story of the federal government's paperwork foolishness.<sup>1</sup> Before our sense of outrage overcomes our sense of humor, however, we should recall that we have fifty state governments, and multitudes of local and municipal governing bodies. All of these groups generate regulations and paper. Government is not excused, but it, alas, is not alone.<sup>2</sup> A personal struggle with efforts to straighten out a bill with a department store computer reminds us that confusing and excessive paperwork is not

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1. One of mine is the bureaucratic decision to send the same hulking package of employers' tax instructions and forms to corporations employing hundreds of people and to the housewife who is trying to pay social security tax for her once-a-week cleaning woman. The touch I especially liked was in the packet of instructions advising the employer to make full use of his computer capabilities in filling out the forms.

2. Private businesses, universities and colleges, and other large institutions grind out more forms, questionnaires, reports, and other paper work as fast as the federal government.

confined to the public sector.

Nor should one be sanguine about any quick cures. Indeed, if congressional efforts are any guide, the end-product of attempts to reform have usually increased, rather than decreased the burden. One case in point is the federal Paperwork Reduction Act.<sup>3</sup> If there is any reduction in the paperwork of the citizenry, it is extremely difficult to locate. But the Act has generated pounds of paper within the federal government itself.<sup>4</sup>

Answering the question whether the federal government over-regulates us is much more complicated than simply weighing the pounds of paper on which the rules and regulations are printed. And popular agreement that we are over-regulated will not withstand any serious scrutiny. If we look beneath the surface, we can find that peoples' opinions concerning over-regulation are diverse and conflicting.

I put aside the opinions of those extreme libertarians who believe that the government should leave us in some original state of nature, except perhaps to build post roads—far away from Walden Pond. These are the kinds of people who think that, without government intervention, the buffalo would roam and the skies would not be cloudy all day. Of course, none of them has ever lived in a home on the range with no rain and with buffaloes trampling the kitchen garden.

Rather, I consider people who know that they must live in this world because the serpent ruined the primal scene for ingenuous Eve and disingenuous Adam a long time ago. I categorize these people very roughly from an orthopedic point of view: any rule or regulation that helps you and hurts me is a pain in my neck; government has no business meddling with my cervical spine. Conversely, any rule or regulation that helps my neck and hurts you is fine; government should relieve my pain. And others, whose necks are not involved, can take a detached view to decide the correct outcomes: academics, philosophers, and federal judges who have left public office.

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3. 44 U.S.C. §§ 3501-3523 (Supp. IV 1980).

4. One particularly ironic feature of the Act is its authorization for the Director of the Office of Management and Budget to promulgate rules, regulations, or procedures as necessary to fulfill the purpose of the Act. *Id.* § 3516. See also *N.Y. Times*, April 4, 1982, at A24, col. 2. (the Reagan Administration has circulated to federal agencies a 100-page memo regarding paperwork reduction).

Perhaps most Americans perceive regulation with some mixture of both of these perspectives. They are willing to endure pain to help others or to serve some common good as long as: (1) it doesn't hurt too much for too long; (2) the burden appears fairly distributed; and (3) the need for some kind of sacrifice by somebody is sufficiently evident.

In short, the decibel level of complaints about a particular set of government regulations is not an accurate measure of public opinion about the permissible extent of government intervention. Nearly any governmental activity will lead some person or group adversely affected to declare that we have crossed the line between sound government and unnecessary meddling. However, no reasoned judgement concerning the charge of over-regulation can be made without a close examination of the full context of the rules, the ends intended to be served, as well as an attempted analysis of the distribution of the costs and benefits created by the means chosen to reach those ends.

### I. DISCERNING A FOREST THROUGH THE TREES

It is perhaps surprising how few Americans are informed about their government. A large percentage—maybe a majority—do not distinguish state and local governments from the federal government, or one branch of government from another. And only a very few have any idea of the process by which the regulations they enjoy or endure are created. Before concluding we are an over-regulated society, one must understand the processes by which two kinds of federal regulations are developed.

The first kind imposes burdens on one or more classes of persons for the benefit of other classes of persons, or upon one set of interests to favor a different and competing set of interests. They are coercive in character, although not always penal. Examples of these include statutes and administrative rules designed: (1) to deter conduct that carries an unreasonable risk of harm to the health and welfare of workers,<sup>5</sup> (2) to prevent monopoly and to maintain competition in the economic sphere,<sup>6</sup> (3) to encourage the develop-

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5. *E.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976 & Supp. V 1981); regulations under the Act appear in 29 C.F.R. §§ 1900-1990.152 (1981-82).

6. The Sherman Act, 15 U.S.C. §§ 1-7 (1976 & Supp. V 1981); The Clayton Act, 15 U.S.C. §§ 12-27 (1976 & Supp. V 1981); 29 U.S.C. 52-53 (1976). For recent regulations promulgated by the Federal Trade Commission under the Antitrust Improvements Act of 1976, 15 U.S.C. § 13a(d)(2)(c) (1976 & Supp. V 1981), see 16 C.F.R. §§ 800-803.90 (1982).

ment of some kinds of industry at the expense of others,<sup>7</sup> and, (4) to remedy gross inequality or disadvantages of particular people while imposing some kinds of burdens on others.<sup>8</sup>

The second kind, also made by statute and by administrative rule or regulation, provides benefits to certain classes of persons or interests without burdening any specific group or interest. They are noncoercive. The burdens entailed are spread throughout society, usually by tapping the general revenues of the federal treasury.

A. *Burden Statutes and Regulations: Administrative Dirty Work*

Here is a fanciful illustration of a "burden" regulation, and the processes by which it is born and raised. Senator Potlatch is very concerned about the energy crisis. His state of Nirvana is richly endowed with oil shale. Unfortunately, the largest deposits of oil shale in his state are found in the national parks. He wants the oil shale developed, but he knows that environmentalists among his constituents are almost as well organized as the persons who want the oil extracted. He, therefore, sponsors the National Park Preservation and Energy Development Bill.

No sooner is the bill in the hopper, than he and many of his colleagues on the Hill are besieged by legions of lobbyists who are eager to see the bill passed and others who are furious about even the thought of enactment. He, therefore, amends his bill to create the National Agency for Park Preservation and Energy Development, "NAPPED." To NAPPED is delegated the authority to devise and administer a program to extract the oil "with appropriate regard for the preservation of the heritage of the great national parks."

The bill will not be at all specific about how the agency is to

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7. See, e.g., 49 U.S.C. § 10704(2) (Supp. 1982) (allows the Interstate Commerce Commission (ICC) to regulate carrier for transportation rates). When the ICC regulates rates to reflect economic and industrial needs, these regulations will be upheld. See *T. & S.F.R. Co. v. United States*, 248 U.S. 248 (1932) (rates which allowed freedom of movement for agriculture upheld). For recent regulations promulgated by the ICC, see 49 C.F.R. §§ 1310.0-.369 (1980) (freight rate tariffs and classifications of motor common carriers).

8. See, e.g., Equal Educational Opportunities and Transportation of Students Act, 20 U.S.C. § 1701 (1982). See also the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1976) (generally protects the public by requiring manufacturers to disclose specific items concerning warranties for consumer goods).

accomplish its tasks to save those parks and to squeeze that shale; the agency is only to use "appropriate regard." Had the bill been more specific, Senator Potlatch could not get the votes needed to pass it. He knows that his colleagues know that their constituents will quickly choose up sides, and he who misjudges the constituent voting power on one side or the other will not serve another term. Nevertheless, a picky senator asks what happens if someone believes that the regulations promulgated by the agency are not "appropriate" enough. Senator Potlatch hesitates no more than a moment before he amends his bill to provide that "the Federal Courts shall have jurisdiction to adjudicate all controversies arising under the National Parks Preservation and Energy Development Act."<sup>9</sup> The bill is enacted. The President signs the Act in Fernwood National Forest, surrounded by troops of boy and girl explorer scouts, with not a smidgen of shale in sight.

After routine scrambling for the presidential appointments to the new agency, the commissioner of NAPPED and her colleagues draft a set of regulations, publish them for comment in the *Federal Register*<sup>10</sup> and brace themselves for the storm. It comes: the interest groups arise, hearings are held, letters pour in, aggrieved congressmen call the commissioner, and their staffers call her staffers. The press runs editorials excoriating the President, the commissioner and each other. To the White House's alarm, TV cameras happily zoom into the fray. The beleaguered commissioner goes back to the drawing board. The regulations that started with forty pages are now 400. But even with all of the promises, exceptions and exemptions, someone's neck is pinched.

Suppose the pinched neck belongs to the Friends of the Bud and Wing Association. The association files a lawsuit against the commissioner, challenging the proposed regulation on every ground their counsel can plausibly raise. Now all of those hot potatoes are in the hands of federal judges whose life tenure gives them asbestos fingers. To those judges is laid the task of trying to figure out whether NAPPED'S challenged regulations followed Congress' intent. And all it really has to work with is "appropriate regard."

The end product is very unlikely to make anyone happy. If Bud and Wing wins, Oil Squeezers, Inc. and all of the stockholders will be wounded. So will the public utilities who had contracted to

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9. Administrative Procedure Act of 1946, 5 U.S.C. §§ 551-559, 701-706 (1976).

10. See Administrative Procedure Act of 1946, 5 U.S.C. § 553(b).

buy Oil Squeezer's oil. And maybe the customers of the utility will be short of power. The judicial gloss on the statute will generate more regulations, and more paper. All the people on Oil Squeezer's side and their *amici*, will complain that the decision and the regulations are ruining productivity.

If Bud and Wing loses and the shale is squeezed, other necks are pinched. The scenery is ruined. So is the fishing. The streams are polluted. The pinched complain to their congressmen. Congress vetoes the regulations.<sup>11</sup> The executive and legislative branches are on a collision course. Unless each retreats, the aggrieved branch will head where? Back to the federal courts.

### B. *Benefit Statutes and Regulations: A Senator's Best Friend*

Benefit statutes and regulations provide a much different scenario. Examples of benefit regulations are federal contributions to the National Endowments,<sup>12</sup> National Institutes of Health,<sup>13</sup> grants to law enforcement agencies,<sup>14</sup> to National Science Foundations,<sup>15</sup> to water projects,<sup>16</sup> to university and college students<sup>17</sup> and, of course, many others. These may be so-called formula grants,<sup>18</sup> project grants,<sup>19</sup> block grants,<sup>20</sup> or appropriations to agencies under

11. See *infra* note 25.

12. 20 U.S.C. § 954 (1976 & Supp. 1982) establishes the National Endowment for the Arts; 20 U.S.C. § 956 (1976 & Supp. 1982) establishes the National Endowment for the Humanities; 20 U.S.C. § 962 (1976 & Supp. 1982) establishes the National Institute of Museum Services.

13. See 42 U.S.C. §§ 281-290a (1978 & Supp. 1982) (includes The National Cancer Institute, The National Heart, Blood & Lung Institute, The National Institute of Dental Research, The National Eye Institute, The National Institute on Aging, and The National Institute of Mental Health).

14. *E.g.*, The Law Enforcement Assistance Administration; 42 U.S.C. § 3711 (1976 & Supp. V 1981). Under 42 U.S.C. § 3713(a) (Supp. V 1981), the Office of Community Anti-Crime Programs was established and is authorized to make grants "to community and citizen groups." *Id.* § 3713(b). An example of administrative regulations under this Act can be found at 28 C.F.R. §§ 20.1-38 (1982) (criminal justice information systems).

15. See *infra* note 23.

16. See, *e.g.*, 42 U.S.C. §§ 3101-3104 (1973 & Supp. 1982) (formula grants for basic water and sewer facilities).

17. See, *e.g.*, 20 U.S.C. §§ 1070-1098 (1982) (higher education assistance grants).

18. Formula grants, unlike block grants (see *infra* note 21), remove almost all discretion from the granting agency. Grants to States For Aid to The Blind, 42 U.S.C. §§ 1201-1206 (1982), provide an example of a formula grant; sections 1202 and 1203 set forth the federal formula upon which federal funding is based; section 1204 warns that federal monies are contingent upon strict compliance with the formula. See generally D. REAGAN & J. SANZONE, *THE NEW FEDERALISM* at 58-61 (1981) [hereinafter referred to as *THE NEW FEDERALISM*].

19. Project grants create considerable federal control of funds: potential recipients of a grant must submit a formal application to the sponsoring federal agency. The Department

authorizing legislation that specifies which class of individuals or institutions qualifies and how.<sup>21</sup>

Our same Senator Potlatch, ever so unwilling to be specific in drafting a burden statute, is more than happy to draft a very detailed benefit statute. He is giving away money, and he wants to be sure that the objects of this bounty get the money and, if possible, to be assured that the beneficiaries of the programs know the person to whom they owe appropriate regard. Senator Potlatch will have lots of company on Capitol Hill. At the same time, Congress also wants the persons who get the money to be accountable for their stewardship—a proper concern.

Almost always, the department or agency charged with the responsibility of administering a statutory benefit program is also required by statute to promulgate regulations to carry out the congressional purpose.<sup>22</sup> The procedure for promulgating regulations is

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of Housing and Urban Development's water and sewer facilities program operates on the basis of project grants. 42 U.S.C. §§ 3102-3108 (1982). Criteria for evaluation of preliminary applications may be found at 24 C.F.R. § 556.1 (1982). See also 20 U.S.C. §§ 1071-1074 (1982) (project grants under the Bilingual Education Act of 1978). It should be noted, however, that project grants do not ensure that the most needy recipients will receive the grants, as only those who are able to prepare an application—often a costly procedure—are considered. See G. BREAK, FINANCING GOVERNMENT IN A FEDERAL SYSTEM 118-22 (1980).

20. The theory behind a block grant is that certain problems can best be remedied using federal monies and local decisions; local recipients of the grants are afforded considerable discretion in spending the money. The Comprehensive Employment and Training Act (CETA) provides a clear example of a block grant. Title I of the Act, 29 U.S.C. §§ 801-837 (1982), allows qualifying cities and counties to design their own programs to remedy unemployment, but the programs must be approved by the Department of Labor. *Id.* By 1977, however, the Department of Labor had issued performance guidelines for grant recipients to follow and thus, local discretion and flexibility had begun to erode. See THE NEW FEDERALISM, *supra* note 18, at 131-40.

21. See, e.g., 20 U.S.C. § 1070(e) (1982) (basic educational opportunity grants). This type of statute is often referred to as an entitlement statute.

22. See, e.g., 42 U.S.C. §§ 1861-1885d (1976 & Supp. IV 1980), which establishes the National Science Foundation (NSF). The NSF is authorized to encourage and initiate scientific research through grants, loans and fellowships. *Id.* § 1862. The NSF, which operates under a Director, *id.* § 1864, and the National Science Board, *id.* § 1863, is given general regulatory authority for administering Congress' purpose. *Id.* § 1870. Examples of regulations promulgated under section 1870 are located at 45 C.F.R. §§ 610.1-6 (1982) (procedures and criteria for resolving questions involving moral character of applicants for and holders of NSF fellowships).

See also 42 U.S.C. §§ 2689-2689aa (1976 & Supp. IV 1980), the Community Mental Health Centers Act. Under this statute, Congress authorized the Secretary of Health and Human Services to make grants "through which comprehensive mental health services are provided." *Id.* § 2689a. Section 2689e provides guidance to the secretary when promulgating regulations. Regulations under this statute are located at 42 C.F.R. §§ 54.101-.604 (1980).

also established by statute.<sup>23</sup> Agency heads have very little discretion in drafting the regulations to implement a benefit statute, because Congress will insist that the regulations follow the minute detail that the authorizing legislation embodies.

If an agency head has the temerity to vary the regulations from the precise words of the detailed statute, congressional response is almost immediate. Key senators and congressmen who have drafted the statutory language will lodge an immediate protest with the head of the department. If the agency head does not respond as immediately, the senator or congressman will be on the telephone complaining. His staffers will reinforce the protest with calls to White House staffers, the trade press, or special interest groups with whom their senators or congressmen have worked in drafting the legislation.

Although members of the Hill and the agency heads will usually try to resolve amicably the differences between the views on benefit regulation, friendly adjustment is not always successful. If Congress does not get its way, senators and congressmen have other means to exert pressure that can capture the attention of even a reluctant agency head. Some of the devices in the congressional persuasion kit include: (1) convening oversight hearings and requiring the recalcitrant agency head to testify before the committees under whose jurisdiction departmental business falls, (2) holding up appropriations for the department or agency, affixing riders to appropriations measures, or slicing funds from one or more of the programs it administers, (3) holding other measures hostage that are a part of an Administration's legislative package, until the Executive Branch sees regulations Congress's way, and (4) "vetoing"<sup>24</sup> of the regulations.

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23. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237-44 (codified as amended in scattered sections of 5 U.S.C.).

24. The term "legislative veto" is somewhat misleading. "It is unfortunate that the term 'veto' has come to be used to describe legislative review of executive or administrative action by resolution. The term has acquired a pejorative connotation . . ." Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 370 (1978). The constitutionality of the congressional veto has not been finally resolved, except for one oblique case in the United States Supreme Court, *Buckley v. Valeo*, 424 U.S. 1 (1976) (congressional "veto" of Federal Election Commission rules held not unconstitutional). See also Federal Salary Act cases: *McCorkle v. United States*, 559 F.2d 1258, 1262-63 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978). This constitutional confrontation has been bubbling for more than fifty years. See W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 119-22 (7th ed. 1979).

## II. BILINGUAL EDUCATION: A BREEDING GROUND FOR REGULATIONS

During my service as a Federal judge and as Secretary of Education, I had the opportunity to observe the interplay of all three branches of government in dealing with both benefit and burden regulations. The experience was educational. I could scarcely have had a more vivid illustration of the dynamics existing between the judicial, legislative, and executive branches than those to which I was treated.

The first jolt in the move from the judicial branch to the cabinet is the glare of publicity. One learns very quickly the value of the news media to government, and, at the same time, the extraordinary difficulty of correcting misapprehensions generated by inaccurate reporting. Very early stories appeared questioning what a California judge was going to do with a new bureaucracy of 17,000 employees<sup>25</sup> and a \$14.5 billion budget.<sup>26</sup> The newspapers did not report that 11,000 of those employees were teachers in schools for the dependents of military personnel overseas,<sup>27</sup> or that those persons were not to be moved to the Department of Education for several years.<sup>28</sup> The newspapers did not report that no new bureaucracy and no new educational programs were created when the Department was born. Some 160 educational programs, all created by legislation anteceding the birth of the Department, were transferred from six departments and one agency<sup>29</sup> to the new Department, along with the same employees who had been administering those programs before they were consolidated in the Education Department. In fact, the new Department was statutorily required to reduce the number of civilian employees attached to the educational programs.<sup>30</sup>

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25. HOUSE COMM. ON GOV'T. AFFAIRS, REPORT ON THE DEP'T OF EDUC. ORG. ACT OF 1979, H. Rep. No. 49, 96th Cong., 1st Sess., 23 (1979) [hereinafter referred to as 1979 REPORT].

26. *Id.*

27. *Id.*

28. *Id.* at 46-48 (the legislation provided for a three year "phase-in" period to effectuate the transfer of these employees to the newly formed department).

29. *Id.* at 26. The six departments were: the Dep't of Health, Education and Welfare, the Dep't of Labor, the Dep't of Justice, the Dep't of the Interior, the Dep't of Defense, the Dep't of Housing and Urban Development. The agency was the National Science Foundation. *Id.*

30. Dep't of Education Organization Act of 1979, Pub. L. No. 96-88, § 403(b), 93 Stat. 670, 683 (1979) (number of full time positions shall be reduced by five hundred after the first fiscal year beginning after the effective date of the Act).

The suggestion that the Secretary of Education could make up her mind about how the multi-billion dollar budget would be spent was entirely fanciful. Congress had very firmly nailed these dollars to the authorizing legislation, and no Secretary would have discretion about how the money should be spent, with trivial exceptions.<sup>31</sup>

The vast majority of the Department of Education's functions involve the administration of benefit statutes. The largest component is the benefit statutes for financial assistance to elementary and secondary education; these statutes provide funds to 14,000 of the nation's 16,000 school districts.<sup>32</sup>

The second largest component of the departmental budget provides financial aid for students attending universities and colleges.<sup>33</sup> In 1980, the Department of Education supplied funds, in the form of grants, loans, and work-study, to one-half of all the students attending post-secondary institutions in the United States.<sup>34</sup> The remainder of the budget is earmarked for financial assistance to special education for deaf and blind persons, adult education, education for handicapped children, Indian education, vocational education, together with funding for smaller programs, such as educational research and statistics, libraries, museums, zoological and botanical gardens. Finally, a small, but very important segment of the budget is earmarked for the Office for Civil Rights.<sup>35</sup>

31. See, e.g., Act of Aug. 14, 1981, Pub. L. No. 97-35, § 513(a), 95 Stat. 444 (1981), which provides:

The total amount of appropriations to carry out Title I of the Elementary and Secondary School Act of 1965 shall not exceed \$3,480,000 for fiscal year 1982. From the amount appropriated in accordance with the preceding sentence, not more than 14.6 percent of such amount for fiscal year 1982 shall be available to carry out . . . [20 U.S.C. §§ 2761, 2771, 2781] of such Act. After the requirement of the preceding section is met, the Secretary of Education shall assure that the amount available for [20 U.S.C. § 2722] of such Act bears the same ratio to the amount appropriated in such fiscal year for Title I of such Act as the amount available for [20 U.S.C. § 2722] in fiscal year 1980 bore to the total amount appropriated for Title I of such Act . . . ."

See also 20 U.S.C. §§ 1019, 1021(b) (1982) (appropriation provisions for higher education assistance programs).

32. See 1979 REPORT *supra* note 25, at 38 (48 million elementary and secondary students are touched by federally funded programs). In 1980, these programs served almost six million disadvantaged school children.

33. *Id.* at 39.

34. *Id.* at 38-41.

35. See *id.* at 35 ("a significant responsibility of the Department is to continue and

Despite the easily documented facts, the misleading publicity has constantly dogged the Department. People continue to cry for the destruction for the Department to get rid of that vast new bureaucracy of 17,000 employees. Efforts to obtain corrections were unavailing. After all, it is an exciting story to tell people that still another gargantuan bureaucracy has been built in Washington to flood the country with paper and more burdensome regulations—a more exciting story than to tell the pedestrian truth.

The first publicity jolt was followed by a series of aftershocks. Appellate judges have the luxury of debating, in confidence, with their colleagues and their law clerks when they are struggling to reach decisions in hard cases. Socratic debate is virtually impossible for most cabinet officers. Rhetorical questions put to staff members by a Secretary are all too often deemed decisions, and, to the Secretary's dismay, those "decisions" appear in the press before the Secretary has a chance to put in a question mark. Washington is not merely a city of leaks; it is a sieve.

The most vivid illustration of the impact of publicity, the interplay and tensions between and among the three branches of the federal government, and between the federal and state governments, was the uproar about bilingual education.<sup>36</sup> It is impossible in brief compass to give more than the sketchiest of outlines of the origins, the cross-currents, and the players in the tangled web of bilingual education. Even the term "bilingual education" is misleading, because it means many different things to different people. To some the term means instruction in both English and a second language; to others it means instruction in learning English for non-English proficient children; and, to others, it means some combination of both, together with ethnic or cultural heritage studies.<sup>37</sup>

If a school district fails to establish an adequate program for bilingual education, students in need of the program may bring suit against the school district for a violation of Title VI of the Civil Rights Act of 1964.<sup>38</sup> Title VI forbids discrimination on the

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improve the Federal commitment to insuring access by every individual to equal educational opportunities.").

36. I have a unique set of perspectives from which to view this controversy. I was directly involved in it as a federal appellate judge, and then as Secretary of Education.

37. Margulies, *Bilingual Education, Remedial Language Instruction, Title VI, and Proof of Discriminatory Purpose: A Suggested Approach*, 17 COLUM. J.L. & SOC. PROBS. 99, 101-08 (1982) [hereinafter cited as *A Suggested Approach*].

38. 42 U.S.C. § 2000d (1976).

basis of race, color or national origin in the administration of any program which receives federal funding;<sup>39</sup> because almost all public schools use federal monies to stock their supply cupboards, each school is bound to conform to the requirements of Title VI. Although most bilingual education suits have been based upon Title VI,<sup>40</sup> aggrieved parties may also state a cause of action claiming a violation of the Equal Education Opportunities Act of 1974.<sup>41</sup> Either statute provides the parties with a federal district court as their forum.

My judicial role in bilingual education began in 1973 in a now-famous case entitled *Lau v. Nichols*.<sup>42</sup> The parents of non-English speaking children of Chinese ancestry brought a class action on behalf of their children in the federal district court in San Francisco against officials of the San Francisco school district. They sought relief against alleged unequal educational opportunities—the school district's failure to establish a program to teach their children effectively.<sup>43</sup> In the federal district court, the plaintiffs relied upon both constitutional and statutory grounds, claiming that the failure to provide these youngsters with equal educational opportunity violated the equal protection clause of the fourteenth amendment and Title VI of the Civil Rights Act of 1964.<sup>44</sup> When the court denied relief, the plaintiffs appealed to the United States

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39. *Id.* (“[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

40. *See, e.g., Lau v. Nichols*, 414 U.S. 563 (1974); *Serna v. Portales Mun. Schools*, 499 F.2d 1147 (10th Cir. 1974); *Rios v. Read*, 480 F. Supp. 14 (E.D.N.Y. 1978).

41. 20 U.S.C. § 1703(f) (1976). The Act reads: “[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” *Id.*

Some recent federal decisions have altered the Supreme Court decision in *Lau*. These decisions require the plaintiff to prove a school district's *intent* to discriminate under Title VI, as opposed to proving discriminatory *effects*. *See Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022, 1026-27 (9th Cir. 1978); *United States v. Texas*, 506 F. Supp. 405, 430-32 (E.D.Tex. 1981). As a result, bringing an action under section 1703(f) may provide an aggrieved party with a less substantial burden of proof, since that section has not been construed to require a showing of discriminatory *intent*. *See Martin Luther King Jr. Elementary School Children v. Michigan Bd. of Educ.*, 463 F. Supp. 1027, 1032 (E.D.Mich. 1978); *see generally A Suggested Approach, supra* note 37.

42. 414 U.S. 563 (1974); 483 F.2d 791 (1973); the federal district court opinion was unpublished.

43. *See* 483 F.2d at 793 (“appellants contend that appellees have abridged their rights to an education and to bilingual education . . .”).

44. 42 U.S.C. § 2000d (1976).

Court of Appeals for the Ninth Circuit. A three-judge panel, with one judge dissenting denied relief.<sup>45</sup> There was a request for the court to take the case *en banc*.<sup>46</sup> After intensive debate within the court, the majority refused to take the case *en banc*.<sup>47</sup> I filed a dissenting opinion from the refusal of the court to take the case *en banc*, with which one other judge agreed.<sup>48</sup> As the case was decided by the Ninth Circuit, constitutional grounds dominated; the majority disposed of the statutory argument in a footnote.

The disappointed plaintiffs filed a petition for a writ of *certiorari* with the Supreme Court of the United States. Up to that point, the United States government was not involved in the litigation. But, when the petition for *certiorari* was filed, the United States intervened, and the Solicitor General asked the Supreme Court to hear the case. The Supreme Court took the case and unanimously overturned the decision of the Ninth Circuit.<sup>49</sup> The Supreme Court did not reach any constitutional question; it decided that Title VI of the Civil Rights Act of 1964 provided a remedy through the regulatory powers of the Department of Health, Education and Welfare. That Department had published guidelines compelling school districts receiving federal aid to rectify the language deficiency of students who could speak no English or who had little English proficiency.<sup>50</sup>

The parents in the *Lau* case did not insist that their children be taught their courses in Chinese, rather, they sought enough instruction for their children to be able to speak and understand English. The Supreme Court observed:

Basic English skills are at the very core of what the public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom exper-

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45. 483 F.2d 791 (1973) (Judge Trask writing the majority opinion in which Judge Wright concurred; Judge Hill dissenting).

46. The request was made by a member of the court who was not a member of the three-judge panel. In February of 1973, proceedings were commenced to obtain a vote of the court to consider the case *en banc*.

47. 483 F.2d at 808.

48. *Id.* at 805.

49. 414 U.S. 563 (1974) (Justice Douglas wrote the majority opinion).

50. 35 Fed. Reg. 11,595 (1970).

iences wholly incomprehensible and in no way meaningful.<sup>51</sup>

The Court did not attempt to lay down the specific remedy for the language difficulties of the Chinese youngsters. The Court said that "[t]eaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners only ask that the Board of Education be directed to apply its expertise to the problem and rectify the situation."<sup>52</sup>

After the Supreme Court decided the *Lau* case, the Office for Civil Rights,<sup>53</sup> then located in the Department of Health, Education and Welfare, promulgated a series of additional and more detailed guidelines that became known as the "Lau Remedies."<sup>54</sup> Those remedies were promulgated without the usual rulemaking procedures. The Lau Remedies were and are complicated and very difficult to understand. Nevertheless, on the strength of those remedies, the Office for Civil Rights negotiated settlement agreements with various school districts in the United States. The agreements were intended to bring school districts into compliance with the guidelines, on pain of losing federal funds if they failed to do so.

Some school districts balked. That difficulty led to another round of law suits—among them, a case in Alaska.<sup>55</sup> The Alaskan court issued a decree compelling the Office for Civil Rights, with all deliberate speed, to produce a set of bilingual education regulations after following statutorily-mandated rulemaking procedures.<sup>56</sup>

Let us pause here for a moment. As you will see, Congress initially passed a burden statute, the Civil Rights Act of 1964,<sup>57</sup> leaving it to the agency, then HEW, to formulate some kind of regulations. When the local educational agencies failed to respond to the evil at which the legislation was aimed, the aggrieved persons went

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51. *Lau*, 414 U.S. at 566.

52. *Id.* at 565.

53. The office is now a part of the Department of Education and is organized pursuant to 20 U.S.C. § 3414 (1982).

54. See, e.g., 45 Fed. Reg. 52,052 (1980). The publication was entitled *Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols*. *Id.* at 52,054.

55. *North West Arctic School Dist. v. Califano*, No. A-77-216 (D.Alaska 1978).

56. The consent decree, entered into by the Office for Civil Rights and the Alaskan School District on September 28, 1978, stipulated that the Office would promulgate rules pursuant to The Administrative Procedure Act.

57. 42 U.S.C. §§ 1981-2000h (1976 & Supp. V 1981).

to the courts for relief. The function of the courts was to decide the controversy, not to frame the particulars of an appropriate remedy by which non-English proficient youngsters would have access to equal educational opportunity. HEW did respond, although it did not follow the statutory procedures for rulemaking.<sup>58</sup> The judicial role would have ended with the Supreme Court decision if local and state educational agencies had faithfully performed their judicially imposed duties to teach the non-English proficient youngsters. Their failures to follow the law, however, resulted in more law suits, and more judicial decrees. The general impression of the public was that the courts created the controversy, and that the imperial judiciary had no business intervening in local school affairs. I doubt that the average citizen recognized that their duly elected school board members were violating a statute passed by Congress, and that no court, including the Supreme Court of the United States, had anything to do with the inability of children to speak English as their first language.

For more than a year before the Department of Education was formed, the Alaskan court order had not been implemented by the Office of Civil Rights. In the meantime, the problems of non-English proficient children were compounding. By 1980, we had over 3.5 million children in the United States who could speak no English or who were not English proficient.<sup>59</sup> During the last decade, we have had more immigration, legal and illegal, from outside our borders than we have had at any time since early in this century.<sup>60</sup> Although the majority of these youngsters are Hispanic, very large numbers are of different racial and ethnic groups. Today, in some of our cities, there are more than 100 languages spoken by non-English speaking children.

When I traded in my judicial robe for my cabinet hat, the controversy was heating up. Lobbying groups on every side of the opinion spectrum were very vocal in their advocacy before all levels of government, federal, state and local, and in every medium of public expression from soap boxes in the park to nationwide television. In the middle of the uproar, it was still necessary to meet the aging judicial mandate to produce regulations. The Department of Education devoted literally hundreds of hours to all of

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58. Although the publication never appeared in the Federal Register, it was widely distributed to school officers and to the general public. See 45 Fed. Reg. 52,054 (1980).

59. 45 Fed. Reg. 52,053 (1980).

60. *Id.*

these issues. Leakage of some of the early drafts of the proposed regulations resulted in dozens of telephone calls and a flood of letters protesting various elements of regulations that had not even been proposed. What a contrast between life on the bench and life on the cabinet hot seat.

Following the statutory procedure for rulemaking, the Department of Education published in the federal register a draft of proposed regulations in August of 1980.<sup>61</sup> Public hearings in six states were set to permit wide public commentary on the proposed rules. Hundreds of pages of testimony were taken. In addition, the Department received thousands of letters, both responsible and irresponsible, commenting upon and criticizing the regulations in their draft form.

The purpose and the policy of the regulations are simple to state, but they were very complicated to draft. The policy was to require school districts to teach non-English proficient youngsters English as quickly as possible, and, while the children were learning English, to give them instruction in required courses in a language that they could understand. The draftsmanship was very complex.<sup>62</sup> Debate raged among educators about the correct methodology to teach non-English proficient youngsters. We were fully aware that we did not have an adequate reservoir of teachers fluent in any language other than English. In some language groups, it is almost impossible to find any teacher who can communicate with the children. The determination of the entrance and exit criteria for non-English proficient children proved very troublesome. To mention only one of the problems: non-English speaking children enter our public schools for the first time at every grade level from kindergarten through the twelfth grade. Entrance criteria to a bilingual program must obviously be very different for a kindergartener than for an eleventh grader. Accordingly, the proposed regulations provided a number of different alternatives available to school districts in trying to reach these children.<sup>63</sup>

As soon as the proposed regulations were published, the national response was every bit as explosive as that which resulted

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61. 45 Fed. Reg. 52,059 (1980).

62. The procedures required by the rules fell into four categories: (1) *identifying* each student's primary language, (2) *assessing* the student's skills in English, (3) *determining* to what *services* the student is entitled, and, (4) *determining* when the services may be *ended*. *Id.* at 52,055.

63. *Id.* at 52,059 (three alternative pathways).

from my hypothetical commissioner running the National Agency for Park Protection and Energy Development. The Department in general, and the Secretary in particular, was vituperatively attacked by all elements of the media.<sup>64</sup> Every segment of the educational enterprise had something to say—school boards, teachers, parents, school administrators, state legislators, political associations, governors, chief state school officers, and a battalion of other people who had either keen interest in or utter contempt for anything to do with non-English speaking children.

The Hill erupted. Angered constituency groups flooded their representatives and senators with protests. The more temperate of these criticisms was that the Department of Education had exceeded the statutory bounds of its creation by intervening specifically in the curricula of the schools affected. Those who held to that view were quite unmoved by the fact that the proposed regulations did not tell any school or school district what courses should be taught. That the controversy occurred during an election year was not irrelevant. Senators and members of Congress who were up for election in their home states were very much attuned to the complaints of their constituents. Some of the more aggrieved members on the Hill responded by setting oversight hearings for the Department; still others put riders on the appropriations for the Department to prevent its receiving any funding for any program unless the Secretary beat a full, immediate and conspicuous retreat. It was more than mildly disheartening for me as an ex-judge to learn that some of the most vocal critics on the Hill had never read the proposed regulations that they were attacking—and the draft was not very lengthy.

With a change of administration, the new Secretary of Education withdrew the proposed regulations. Now, where is bilingual education?<sup>65</sup> We still have more than 3.5 million youngsters who do not speak English or who are non-English proficient. We still have the command of the Supreme Court in *Lau v. Nichols*. We still have court decrees ordering the publication of regulations. We still have in force the *Lau* remedies and the agreements by more than 200 school districts to follow them.

At the same time, federal monies that were the incentives for

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64. See, e.g., *Officials Talk Down Bilingual Educ. Rules*, 66 A.B.A.J. 1504 (1980).

65. See *Bilingual Education in the 1980's: Sink or Swim?* Vol. 2, No. 4 CHILDREN'S L. RIGHTS 4, 4-9 (1981). See generally *A Suggested Approach*, *supra* note 37.

obedience to the *Lau* remedies are being very severely cut. Federal funding that had been available to help school districts with the necessary money to run bilingual education programs has been cut in half,<sup>66</sup> and the administration is seeking deeper cuts. More than twenty per cent of the funding for elementary and secondary education has been cut. Taxpayer rebellions have left state after state with insufficient funds to meet the basic demands for public education, including language instruction.

The doors to the federal legislative and executive branches are closing, and closing very rapidly, upon these non-English speaking children and their parents. The impact of these responses will be first felt by the children themselves and their parents; but, the longer range impact will be felt by the entire country. Where are all of those aggrieved to turn? Unless state governments become responsive, or the executive and legislative branches of the federal government change their collective minds, there appear to be only two avenues of redress—one leads back to the courts and the other is to the streets.

*Lau v. Nichols* and its consequent statutes and litigation help explain the intricate origins of administrative regulations. The lesson in *Lau*, however, is painfully hard for us to learn. Like the *Lau* remedies, all regulations—both benefit and burden—are drafted to allay the emotional volatility generated by a particular issue or problem. Regulations do not cause these problems; it is the other way around. To be sure, regulations may miss the mark. They may be awkwardly drafted—too general, too specific, or too ambiguous for an agency to implement effectively. When any of these deficiencies exist, the cure is to modify the regulations. But *banishing* the regulations does not banish the problems: no child can be taught to read or to speak English by repealing statutes or by erasing regulations.

#### CONCLUSION

There are real choices to be made by all Americans, and we cannot escape those choices by impairing or dismantling the agencies of government that bring us the bad news. The government did not create the energy crisis. All of us consumed our way into it.

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66. STATE OF THE STATES, A Research Report Prepared by the American Federation of State, County and Municipal Employees and the Public Employment Dep't, AFL-CIO, 2 (1983) (Analysis of the FY 1982 Federal Budget).

We must decide whether we are more willing to curb our appetite for petroleum than we are to destroy our national parks. We have to decide whether we would rather educate our children and the children of our fellow Americans than we would to build an even larger nuclear strike force or to create more sophisticated military hardware. We can make those choices, and make them wisely, if we discard our immature views of government and recognize that both our friend and our enemy is not the *government*—it is us.

