FORD, CARTER, AND DEREGULATION IN THE 1970S

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INTRODUCTION

Several respected experts recently declared victory in the deregulation of telecommunications, favorably comparing changes in the industry to the 1970s, when Gerald Ford and Jimmy Carter eliminated regulations on transportation and oil and gas industries.[1] Compared to that wave of deregulation, however, declaring victory in telecommunications is premature. Regulatory reform in communications has always lagged behind reform in transportation and oil and gas by several decades, and the gap has not yet closed. When deregulation of transportation and oil and gas began in 1974, substantial sectors of those industries had already been freed of regulation and opened to competition. The process of opening sectors of telecommunications to competition, however, only started in 1974.

In the transportation and oil and gas industries, a second deregulatory step lifted the entire regulatory edifice. That second step has yet to be taken at the federal level in telecommunications.[2] While the process of deregulation is underway in some states, progress has been slow. For example, the California commission recently lifted price regulations on retail services, but it is still considering whether to eliminate tariffs and contract filing requirements. Some smaller states have gone further and eliminated tariffs for retail telecommunications

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1. *See, e.g.*, PETER J. WALLISON, AEI, GROUNDHOG DAY: RELIVING DEREGULATION DEBATES 1 (2006), http://www.aei.org/publications/ pubID.25034/pub_detail.asp.

2. William A. Niskanen, *A Retrospective*, REGULATION, Summer 2002, at 4-5 ("Most of the older forms of economic regulation, some dating from the nineteenth century, have now been substantially reduced or eliminated—including most of the industry-specific regulation of agriculture, communications, energy, finance, and transportation. . . .The major remaining challenges involve further deregulation of the wired telephone and electricity networks. . ."); Robert W. Crandall*, A Somewhat Better Connection*, REGULATION, Summer 2002, at 22 ("Unlike transportation, the change in atmosphere has not led to deregulation in telecommunications.").

services, but the services often remain subject to price caps.[3]

The second step will not be taken at the federal level until a president focuses on freeing telecommunications from regulation so that special interests that benefit from the regulations do not find a sympathetic ear at the White House. In addition, telecommunications regulators need to do three related things: (1) avoid complexity; (2) avoid choosing sides in competition; and (3) avoid balancing the interests of competitors. Because none of those options are currently in practice, deregulation is unlikely to happen anytime soon. As the industry waits for real deregulation, it is instructive to consider the mistakes that made the deregulatory wave of the 1970s necessary and the factors that made it possible.

The deregulatory wave of the 1970s began when Richard Nixon resigned. Nixon had presided over the apogee of economic regulation in American history. Faced with run-away inflation, he instituted the most extreme peace-time economic regulations since Jefferson embargoed foreign trade. Nixon imposed wage and price controls, putting the federal government in charge of business prices and wages.[4] However, the controls were ineffective and Nixon allowed them to expire in April 1974, with one significant exception. As the country was in the midst of an energy crisis, price controls on oil and gas were retained, making energy the most regulated sector of the economy outside communications and transportation.

By the 1970s, complexity plagued regulations in those industries. Justice Breyer recommended that regulators "strive for simplicity," but Occam's razor has never appealed to regulators.[5] On virtually every occasion that regulators in those industries addressed the unintended

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3. Assess and Revise the Regulation of Telecommunications Utilities, *Order Instituting Rulemaking on the Commission's Own Motion*, Cal. PUC Decision 06-08-030, Cal. PUC Rulemaking 05-04-005, 2006 Cal. PUC LEXIS 367 (2006); *see also,* N.D. Cent. Code § 49-21-01.2 (2005).

4. For details of the controls, *see* President Richard M. Nixon, Address to the Nation Outlining a New Economic Policy: The Challenge of Peace (Aug. 15, 1971), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=3115; President Richard M. Nixon, Special Message to the Congress Announcing Phase III of the Economic Stabilization Program and Requesting Extension of Authorizing Legislation (Jan. 11, 1973), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4119; President Richard M. Nixon, Address to the Nation Announcing Price Control Measures (June 13, 1973), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=3868; Exec. Order No. 11,615, 36 Fed. Reg. 15,727 (Aug. 15, 1971); Exec. Order No. 11,627, 36 Fed. Reg. 20,139 (Oct. 16, 1971); Exec. Order No. 11,695, 38 Fed. Reg. 1,473 (January 12, 1973); Exec. Order No. 11,723, 38 Fed. Reg. 15765 (June 15, 1973); Exec. Order No. 11,730, 38 Fed. Reg. 19,345 (July 19, 1973).

5. STEPHEN BREYER, REGULATION AND ITS REFORM 184 (1982). Regulators would do well to follow a slightly-revised version of William of Ockham's famous rule, *ordinatii non sunt multiplicanda praeter necessitatem*. (Regulations should not be multiplied beyond necessity.)

consequences of their rules, they made the rules more complicated by exempting certain services or competitors, rather than taking the sensible step of lifting the rules. They avoided lifting regulations because they wanted to benefit certain types of competitors—or, in the case of oil and gas, because they wanted to disadvantage certain companies. Once regulatory advantages were bestowed on competitors, they fought against all attempts to lift the regulations.

The political power of the regulated companies and their unions was finally overcome by two presidents who made deregulating the industries a top priority. After Nixon resigned, Gerald Ford "made a great hullabaloo about deregulation."[6] During his short time in office, he appointed pro-deregulation commissioners and convinced Congress to partially deregulate railroads and oil and gas. Jimmy Carter picked up where Ford left off. "Jimmy Carter seized on deregulation very early in his administration largely because Ford had prepared the issue for action."[7] Carter scored a remarkable string of victories. He lifted most of the remaining regulations on oil and gas, and he revolutionized the transportation industry by eliminating controls on airlines, railroads and trucking companies.

I. HISTORY OF TRANSPORTATION REGULATION

When Ford took office, railroad regulations had been unchanged relatively for eighty-seven years. The regulations had been enacted at the end of the 19th century, when the railroads had taken advantage of the lack of practical alternatives to monopolize the movement of people and goods. In 1887, the government responded with the Interstate Commerce Act, leading to the creation of the first independent regulatory commission, the Interstate Commerce Commission. The act restricted competitive entry and exit, required that all charges be "reasonable and just," and limited price competition by prohibiting discrimination.[8]

During the 1920s, new semi-trailers challenged the railroads' monopoly over the transport of goods, which enabled trucking

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6. John Osborne, *White House Watch: Ford and Deregulation*, NEW REPUBLIC, October 11, 1975, *reprinted in* JOHN OSBORNE, WHITE HOUSE WATCH: THE FORD YEARS 192-97 (1977).

7. MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 241 (1985); *see also* PAUL W. MACAVOY, INDUSTRY REGULATION AND THE PERFORMANCE OF THE AMERICAN ECONOMY 4 (1992) ("The Reagan administration carried on an effort that had been initiated as early as the Ford administration but that had reached its zenith with deregulation of airline, trucking, and railroad services in the Carter administration."); David B. Cohen & Chris J. Dolan, *Debunking the Myth: Carter, Congress, and the Politics of Airline Deregulation*, WHITE HOUSE STUDIES, Spring 2001, at 197 ("Carter benefited from a process that was well underway when he was sworn in on January 20, 1977.").

8. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (repealed 1978).

companies to compete with very little capital. At the same time, the transport of people was revolutionized by the Ford Motor Company, which mass-produced automobiles and the first successful airliner. The sensible response to the erosion of the railroad market power would have been to lift regulations, but eliminating regulation was not in vogue during the failure of *laissez-faire* capitalism that was the Great Depression. During the New Deal, Congress passed laws patterned on the 1887 railroad legislation to regulate trucking, airlines and telecommunications.[9] Independent regulatory commissions were established, competitive entry was limited, prices were fixed, and nondiscrimination rules were promulgated to ensure that vigorous price competition did not develop.

The ICC was given jurisdiction over trucking companies and prevented competitive entry by rarely granting new trucking permits.[10] The development of efficient trucks should have been a great boon to shippers. Trucking companies had the ability to deliver door-to-door, rather than to the nearest train station; they could travel the most direct route possible, rather than where a railroad happened to have track; and they could schedule to meet demand, rather than to wait for a set train schedule. ICC regulations, however, prevented truckers from offering those benefits to consumers. Trucking companies were forced to travel set routes at set prices. As the negative impacts of regulation were identified, the ICC worked incrementally, easing regulations on narrow segments of the industry, trying to address each issue without lifting the entire regulatory edifice. The result was a pastiche of regulations under which a company might become exempt based on its size or number of customers. By the time Ford took office, unregulated carriers—independent truckers, companies that shipped their own products, and carriers that agreed to serve one company only—carried more freight than the regulated companies.[11]

Similarly, the Civil Aeronautics Board ("CAB") was given jurisdiction over the airlines, and for 40 years it did not allow a single new, major airline to start flying.[12] Airlines rarely were allowed to fly

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9. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938) (repealed 1978); Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, 543-567 (1935). The ICC was first given jurisdiction over telecommunications companies in 1910, when common carriage rules were applied to the industry. Mann-Elkins Act, ch. 309, 36 Stat. 539, 539-557 (1910) (codified at 47 U.S.C. § 601 (1934)). The full panoply of regulations was imposed by the Communications Act of 1934, ch. 652, 48 Stat. 1064, 1064-1105 (codified as amended in scattered sections of 47 U.S.C.).

10. Osborne, *supra* note 6 at 195-196.

11. BREYER, *supra* note 5, at 223; DERTHICK & QUIRK, *supra* note 7, at 23.

12. *See* ANDREAS KNORR & ANDREAS ARNDT, INSTITUTE FOR WORLD ECONOMICS AND INTERNATIONAL MANAGEMENT, SUCCESSFUL ENTRY STRATEGIES ON THE DEREGULATED US DOMESTIC MARKET (2002), http://www.iwim.uni-

new routes, and the CAB took years to decide applications.[13] The CAB made flying comfortable for the wealthy but unavailable to the masses. Prices were high, flights frequent, and airports uncrowded. But everything was not better for the Jet Set. Passengers often had to change airlines to reach their destinations, because the commission did not allow one airline to serve both legs of a trip. To be responsive to passenger needs, each airline needed to serve most major routes, which the CAB made impossible. The CAB allowed only one or two airlines to serve most routes between major cities, and no airline was allowed to serve more than a small number of major routes. The CAB almost killed Federal Express in its infancy when it denied the company's petition to fly cargo in large aircraft. The company survived only because the CAB did not have jurisdiction over small aircrafts. Federal Express flew a fleet of small planes, and it often had to fly two smaller planes when one larger plane would be much more economical. The company could not make a profit during the early 1970s, and almost did not survive.

The regulatory edifice made the country more insular than it wanted to be. Each commission subsidized local service by keeping the price of long distance service artificially high. Despite the fact that costs were similar between long and short trips, the CAB required that airlines charge more for long trips than for short ones.[14] As a result, most Americans could not afford to fly to other areas of the country—the cheapest coast-to-coast round-trip flight in 1974 cost more than $1,400 in today's dollars. The poor also could not afford to take a bus to visit relatives and friends in other parts of the country, because the ICC forced bus companies to charge artificially high prices for long trips to subsidize service between nearby towns. Most people could not afford to phone friends and relatives regularly in other parts of the country, because the FCC and state regulators set long distance rates high to subsidize local service. Coast-to-coast calls cost $2 a minute in today's dollars.

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bremen.de/publikationen/pdf/w022.pdf; Dipendra Sinha, *Regulation and Deregulation of US Airlines*, 20 J. TRANS. HIST. 46, 58 (1999); President James Earl Carter, Airline Industry Reform Legislation, Remarks at a Briefing for Representatives of the Airline Industry and Public Interest Groups (June 20, 1977), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=7698.

13. *See generally*, Robert W. Poole, Jr. & Viggo Butler, *Airline Deregulation: The Unfinished Revolution* (Competitive Enter. Ins. Policy Study No. 255, 1999), *available at* http://www.reason.org/ps255.html. A 1974 Supreme Court opinion upholding the ICC's rejection new route applications showed the proceedings that applicants were forced to endure. *See generally,* Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281 (1974). The applications were filed 1966, and the ICC issued its order in 1971. The ICC held 18 months of hearings with nearly 1,000 witnesses representing the 10 applicants and the 66 incumbents opposing the applications.

14. *See* DANIEL P. KAPLAN & MARK R. DAYTON, CONGRESSIONAL BUDGET OFFICE, POLICIES FOR THE DEREGULATED AIRLINE INDUSTRY 3 (1988), http://www.cbo.gov/ftpdocs/55xx/doc5541/doc02b-Entire.pdf; Sinha, *supra.*note 12, at 58.

The only way most Americans could keep in contact with other areas of the country was to get in a car and drive. The Eisenhower Highway Act of 1955-56 made driving across the country practical. It had also eliminated, once and for all, the possibility that the railroads could monopolize transportation. But the regulatory system remained and kept the nation apart. To make matters worse, the energy crisis of the early 70s proceeded to render driving to other parts of the country prohibitively expensive.

II. ENERGY PRICE CONTROLS

When Ford took office, a spike in oil prices had been wreaking havoc on the economy. OPEC cut back production in response to America's support of Israel during the Yom Kippur War of 1973, and the price of a barrel of oil jumped from $1 to $10. Price controls were in place, but their primary impact was to increase the country's dependence on foreign oil. When Nixon first imposed price controls on domestically-produced oil, the oil companies had less incentive to pump oil, and production fell. To offset the drop in supply, Nixon lifted restrictions on oil imports in April 1973 and oil imports skyrocketed.[15]

The sensible response to the drop in domestic oil production would have been to lift the controls on energy products, but Nixon's regulators followed the typical regulatory pattern of making rules more complex. Nixon's Cost of Living Council lifted controls only on "new oil," defined as oil from new wells and oil from old wells above the wells' 1972 volume. Price controls were not lifted from "old oil," that is, oil produced from an existing oil field below the level of production in 1972.[16] In theory, the oil companies had already paid for the production facilities for old oil, so the remaining controls on old oil would not depress production, while freeing new oil from price controls would promote production. The theory, however, did not match reality. Although oil companies had already paid for most equipment at the old fields, they had to invest in those fields to keep production at the same level. Once the oil companies were allowed to charge more for new oil than old, they diverted capital from old oil fields to new fields and to fields that were producing at higher than their 1972 levels. Old oil

15. Proclamation No. 4210, 38 Fed. Reg. 10,725 (May 1, 1973); Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (codified as amended at 15 U.S.C. §§ 751-60 (1988)); Richard L. Gordon, *Lessons Learned and Forgotten*, REGULATION, Summer 2002, at 46.; MACAVOY, *supra* note 7, at 9; *see* FOSTER ASSOCIATES, INC., ENERGY PRICES 1960-73, 18 (1974), *available at* http://www.fordfound.org/elibrary/documents/0102/toc.cfm.

16. 10 C.F.R. § 212.73 (1973); 38 Fed. Reg. 22,536 (Aug. 22, 1973); 38 Fed. Reg. 34,414 (December 13, 1973); 39 Fed. Reg. 744 (January 2, 1974); 39 Fed. Reg. 1924 (January 15, 1974). A complete description of the energy controls is contained in FOSTER ASSOCIATES, INC., *supra* note 15, at 21-27.

production declined at a rate of 14 percent per year.[17]

The distinction between new and old oil caused downstream economic distortions. Oil refiners that happened to have contracts in place with producers of cheap old oil had an arbitrary competitive advantage over other refiners that had to purchase expensive new oil. To remedy the situation, the Federal Energy Administration complicated the regulatory scheme even further by issuing "entitlements" to refiners, which allowed them to buy a specified number of barrels of old oil. At the same time, the FEA froze all distribution relationships between oil suppliers and refiners, and refineries were allowed to increase prices only to reflect cost increases. The controls flowed through to retail sellers of gasoline, heating oil and diesel fuel, who were not allowed to charge more than their costs plus seven cents per gallon.[18]

The controls had contributed to—and may have been the sole cause of—shortages of oil and natural gas in parts of the country.[19] Daniel Yergin and Joseph Stanislaw have called the energy control program "a lasting lesson in the perversities that can ensue when government takes over the marketplace." [20] William Simon, who ran the program, agreed: "The kindest thing I can say about it is that it was a disaster."[21] The price controls contributed to long lines and sold-out gas stations during the oil crisis of 1973-74. At the same time, they caused shortages of natural gas. The price of natural gas that crossed state lines was lower than the price of gas that was sold intrastate, and shortages hit various areas of the country as gas producers sold gas in-state, rather than shipping it to where it was needed. The shortages were serious; some states found it necessary to cut consumption in half. Faced with the shortages, regulators again chose more complexity. They set up a new system of controls to allocate scarce supplies of gas.[22]

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17. Herman Kahn, Oil Prices and Energy in General (Hudson Ins. Research Memorandum No. 2, August 1974) (copy on file with author).

18. 39 Fed. Reg. 42,246 (Dec. 4, 1974); 10 C.F.R. § 211.67; FOSTER ASSOCIATES, INC., *supra* note 15, at 24.

19. BREYER, *supra* note 5, at 244 ("The major adverse effect of regulation was to cause—or at least to aggravate—a serious natural gas shortage.").

20. DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS 64 (1998); JAMES REICHLEY, CONSERVATIVES IN AN AGE OF CHANGE 364 (1981).

21. *Id.* at 361-64.

22. BREYER, *supra* note 5, at 244 ("[O]nce the shortage was created, it was necessary to develop another system of regulatory allocation."); Memorandum from Frank Zarb on Natural Gas Shortages to the President (August 6, 1975), *in* Briefing Papers from Energy Review with the President (August 9, 1975) (on file at Gerald R. Ford Presidential Library, Presidential Handwriting Files, Box 50, Folder: "Utilities – Energy (3)"); Stephen Breyer, *Reforming Regulation*, 59 TUL. L. REV. 4, 5 (1984); REICHLEY, *supra* note 20, at 361-64; DERTHICK & QUIRK, *supra* note 7, at 208; Gordon, *supra* note 15.

III. NIXON'S TEPID DEREGULATORY EFFORTS

Nixon espoused deregulation, but he backed away when he ran into opposition from regulated companies and their unions. The Teamsters were one of the few unions to support Nixon, and when they objected to legislation drafted by his Transportation Department to deregulate trucking, Nixon withdrew his support.[23] The Nixon administration was more concerned about the financial condition of transportation companies than about lifting regulations. Despite protection from competition, the airlines were in poor financial condition, with Pan Am in particular on the verge of bankruptcy.[24] The railroads were in even worse shape, and nationalization of the rails was a real possibility. The federal government formed Amtrack in 1971 to take over passenger traffic. Penn-Central filed bankruptcy in 1970—at that time the largest bankruptcy in U.S. history—and the federal government created Conrail to operate the Penn-Central tracks and other bankrupt routes in the northeast.[25]

Almost uniformly, Nixon appointees to regulatory commissions favored more regulation over deregulation. Under Chairman Secor Browne and his successor, Robert Timm, the CAB followed an informal policy of denying all new route applications, and eliminated what little freedom airlines had to sell discount fares.[26] Browne and Timm also promoted anticompetitive agreements between airlines. In 1970, for instance, the Department of Transportation brokered an agreement between American, TWA, and United to cut back on coast-to-coast flights. The CAB approved the agreement and exempted it from antitrust laws, later approving another capacity-limitation agreement between the airlines in early 1973. When the Energy Policy Office issued rules allocating jet fuel to airlines, the CAB tried to help airlines conserve fuel by ordering them to coordinate schedules, and approved four coordinated schedule agreements on October 31.[27]

23. DERTHICK & QUIRK, *supra* note 7, at 38. *See also* Thomas Gale Moore, *Moving Ahead*, REGULATION, Summer 2002, *available at* http://www.cato.org/pubs/regulation/regv25n2/v25n2-3.pdf.

24. *Commanding Heights: Up for Debate: Deregulation* (PBS Television Broadcast May 2003), *available at* http://www.pbs.org/wgbh/commandingheights/shared/minitextlo/ufd_deregulation_full.html; *see also* John E. Robson, *Airline Deregulation: Twenty Years of Success and Counting*, REGULATION, Spring 1998, at 17, *available at* http://www.cato.org/pubs/regulation/regv21n2/airline2-98.pdf; BARBARA STURKEN PETERSON & JAMES GLAB, RAPID DESCENT 27-46 (1994); DERTHICK & QUIRK, *supra* note 7, at 22.

25. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (codified as amended in scattered sections of 45 U.S.C.); President Richard M. Nixon, Statement on Signing the Regional Rail Reorganization Act of 1973 (January 2, 1974), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4274.

26. Cohen & Dolan, *supra* note 7, at 198.

27. CAB Order 73-7-147; CAB Order 73-10-50; CAB Order 73-10-110; CAB Order

The most charitable explanation of why Nixon backed away from deregulation is that he shared a common confusion of Republican leaders—he confused supporting business with supporting the free market. Companies that benefit from the rules fight hard against attempts to lift economic regulations, which often stymies Republicans like Nixon because acting against business interests is a departure from their customary position. A less-charitable explanation is that Nixon was bending to the will of his political contributors. The Watergate scandal exposed how regulated companies lined up to give briefcases of cash to the Nixon campaign. The chairman of American Airlines admitted that the company had made an illegal contribution of $55,000 to Nixon's campaign. Braniff Airways announced that it had made illegal contributions totaling $50,000. Gulf Oil pled guilty to making illegal contributions totaling $100,000. Phillips Petroleum also pled guilty to making an illegal $100,000 cash contribution.[28]

IV. FORD'S EFFORTS TO DEREGULATE TRANSPORTATION

Gerald Ford was not cowed by opposition from politically-connected companies and unions. Roderick Hills, Counselor to the President, explained that Ford pushed deregulation knowing that he would face strong opposition: "He was aware that his support for such reform would be strongly opposed by the industries affected, by labor unions and by strong congressional elements. He persisted, nonetheless."[29] Ford's Secretary of Transportation William Coleman tells an illuminating story. When Coleman presented a draft trucking deregulation bill to Ford, the president took a puff on his pipe and asked about the political impact of the bill. When Coleman explained that both the Teamsters and the trucking companies would fight hard against it, Ford was pleased. "Well, if the Teamsters and truckers are against it, it must be a pretty good bill."[30]

74-7-105. The D.C. Court of Appeals ruled that the October 31, 1973 order was justified by the oil crisis, but it overturned the rest of the orders. *See* United States v. Civil Aeronautics Board, 511 F.2d 1315 (D.C. Cir. 1975).

28. R.W. Apple, Jr., *A Tragedy in Three Acts, in* THE END OF A PRESIDENCY 30 (1974); Linda Amster, *Events Leading to the Resignation of Richard M. Nixon*, *in* THE END OF A PRESIDENCY 23, 266 (1974); EVAN DROSSMAN & EDWARD W. KNAPPMAN, WATERGATE AND THE WHITE HOUSE: JULY-DECEMBER 1973, 26, 28, 30, 31, 109, 116, 119 (1973); Edward W. KNAPPMAN & EVAN DROSSMAN, WATERGATE AND THE WHITE HOUSE: JANUARY-SEPTEMBER 1974, 42, 133, 187 (1974).

29. Trude B. Feldman*, Gerald Ford at 90 Reflects on his Presidency, Prays for Bush*, WORLDTRIBUNE.COM, August 9, 2003, http://www.worldtribune.com/worldtribune/WTARC/2003/ss_ford_07_20.html.

30. Interview with William Coleman in Washington D.C. (July 6, 2004). For report of same incident, *see also* DERTHICK & QUIRK, *supra* note 7, at 46; Paul H. Weaver, *Unlocking the Gilded Cage of Regulation*, FORTUNE, February 1977, at 182.

Deregulation came naturally to Ford; he was a traditional conservative who believed in less government. His deregulatory inclinations were reinforced by his economic advisors, most prominently Chairman of the Counsel of Economic Advisors, Alan Greenspan.[31] Economists throughout the government had supported deregulation for years, and Ford gave them leadership and support that they had never experienced. "Under him, the loose, informal sub-community of reformers inside the executive branch was converted into a more organized force, aided by White House leadership to settle internal differences, and inspired by the belief that a president was prepared to take political risks on behalf of their cause."[32]

Ford was also driven by his belief that deregulation would help stem inflation, and thought about fighting inflation in microeconomic terms. Rather than attacking the core problem of monetary growth, Ford tried to convince consumers to spend less and companies to charge less. Some of Ford's efforts were questionable, such as his Whip Inflation Now program under which Americans pledged not to buy expensive goods. Other efforts, like deregulation, had salutary long-term benefits but little impact on inflation.

It was the nation's misfortune to have a Federal Reserve Chairman who shared Ford's microeconomic focus. Arthur Burns controlled the country's money supply and thought that monetary policy was not an appropriate tool to fight inflation.[33] From the minute Nixon appointed him in 1970, Burns allowed the money supply to grow at an unprecedented rate, and inflation followed.[34] In 1974, the consumer price index grew by double digits for the first time in the post-war period. Inflation peaked when Ford took office in August 1974, when consumer

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31. For example, Greenspan urged Ford to deregulate the trucking industry. Notes of Michael Raoul-Duval of Meeting with President Ford and Others (Apr. 25, 1974) (on file with the Gerald R. Ford Presidential Library, Box 6, File: "Meeting with the President, 4/25/75, Greenspan, et al. (energy, farm bill, railroads).").

32. DERTHICK & QUIRK, *supra* note 7, at 49.

33. Robert Hetzel offers a good analysis of Burns' views on monetary policy and inflation. *See* Robert L. Hetzel, *Arthur Burns and Inflation,* FED. RES. BANK OF RICHMOND ECON. Q, Winter 1998, at 21.

34. In 1972, the growth of M1 hit an unprecedented rate of 9.2 percent, and M2 grew by double digits for the first time in the post-war period in both 1971 and 1972. Real interest rates plummeted in 1971 and stayed abnormally low until 1973. Burns' tenure at the Fed was the only time in post-war history that the Fed consistently kept the federal funds rate below the rate of inflation. 2005 *ECON. REP. OF THE PRESIDENT.*, 291, *available at* http://www.gpoaccess.gov/eop/2005/2005_erp.pdf; U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1976, no. 790, fig. 16-2 (1976); Lee Hoskins, *Monetary Policy AG*, SHADOW OPEN MARKET COMMITTEE, May 2, 2004, at 2 ("Money growth (M2) was in double digits much of the time and real interest rates often were negative."), *available at* http://www.somc.rochester.edu/May05/Hoskins.pdf.

prices were growing by an annual rate of 15.6 percent.[35]

Ford made deregulation a key element of his fight against inflation.[36] In July 1975, Ford met with the chairs and ranking minority members of ten regulatory agencies in the East Room of the White House. Ford explained why he cared about deregulation:

> We should recognize that occasionally Government policies which appear to be in the short-term public interest are in fact detrimental to long-term consumer interests. . . . It is my strong conviction that the consumer is best able to signal his wants and needs through the marketplace, that government should not dictate what his economic needs should be. . . . I believe the Government should intrude in the free market only when well-defined social objectives can be obtained by such intervention or when inherent monopoly structures prevent a free, competitive market system from operating. Government should foster rather than frustrate competition. It should seek to ensure maximum freedom for private enterprise.[37]

The president then urged the commissioners to start easing regulations. "It is my judgment that in every case you have to ask yourself individually as commissioners and as a commission: Is regulation better in each case than an unregulated market?"[38]

Ford decided to focus his deregulatory efforts on transportation. "Few sectors of the American economy were more stifled by government regulation than the transportation industry, and I thought deregulation was urgently required."[39] He gave deregulation of transportation a prominent place in his 1975 State of the Union speech:

> Now, we badly need reforms in other key areas in our economy: the airlines, trucking, railroads, and financial institutions. I have submitted concrete plans in each of these areas, not to help this or that industry, but to foster competition and to bring prices down for the consumer.[40]

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35. *Recent Price Developments*, FEDERAL RESERVE BULLETIN, September 1974, at 613-14; Memorandum from Alan Greenspan to the President*, Consumer Price Index for August* (September 19, 1974) (on file at Gerald R. Ford Presidential Library, Presidential Handwriting Files, Box 4, Folder: "Business and Economics – National Economy 9/74");U.S. BUREAU OF THE CENSUS, *supra* note 33.

36. President Gerald R. Ford, Address to a Joint Session of Congress on the Economy (Oct. 8, 1974), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4434.

37. President Gerald R. Ford, Remarks at a Meeting to Discuss Federal Regulatory Reform (July 10, 1975), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=5063.

38. *Id.*

39. GERALD R. FORD, A TIME TO HEAL 273 (1979).

40. President Gerald R. Ford, Address before a Joint Session of the Congress Reporting on the State of the Union (Jan. 19, 1976), *available at*

Ford thought that deregulation of the railroads would be easiest to push through Congress, because he could add funding for Conrail, which key members of Congress dearly wanted. "Railroad deregulation would be my number one priority."[41] In May 1975, Ford submitted the Railroad Revitalization and Regulatory Reform Act, proposing to ease restrictions on abandonment and to allow railroads to change rates within a range without ICC approval. To induce Congress to pass the bill, Ford added federal funds for restructuring Conrail.[42] He also promised to veto any bill that was stripped of its deregulatory provisions, and Congress passed the bill in its entirety in 1976.[43]

It took three years for the ICC to take advantage of its new flexibility under the act. Until 1979, when a deregulatory majority took over the commission, Chairman George Stafford, a Nixon appointee, proved to be staunchly opposed to reform.[44] Part of the responsibility was Ford's. He started his administration choosing commissioners because of their overall qualifications, paying little attention to whether they shared his deregulatory agenda. After Ford appointed him to the ICC in 1975, Roger Corber called deregulation "a prescription for disaster," and he followed with a speech denouncing deregulation. Ford was surprised to read about the speech in the Grand Rapids paper, and he asked his aides, "Isn't this one of ours?"[45] Ford started to pay attention with later appointments. His other ICC appointees, Betty Jo Christian and Charles L. Clapp, were consistent supporters of competition and deregulation, but they did not form a deregulatory majority because Ford had misfired with the appointment of Corber.[46]

Ford was more successful forcing changes at the CAB. When Ford took office, CAB Chairman Robert Timm was being investigated for trips he took at the expense of regulated companies. Ford wanted to fire Timm, but White House Counsel Philip Buchen explained that he could only remove a member of an independent commission in the middle of

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http://www.presidency.ucsb.edu/ws/index.php?pid=5677.

41. FORD, *supra* note 39, at 273.

42. President Gerald R. Ford, Special Message to the Congress Proposing Reform of Railroad Regulations (May 19, 1975), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4925.

43. Pub. L. No. 94-210, 90 Stat. 31 (1976); President Gerald R. Ford, Statement on the Railroad Revitalization and Regulatory Reform Act of 1976 (Feb. 5, 1976), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=6121.

44. FORD, *supra* note 39, at 366; Osborne, *supra* note 6, at 195; DERTHICK & QUIRK, *supra* note 7, at 15.

45. Memo from Jim Connor to Ed Schmults, with enclosure (Apr. 1976) and Memo from Ed Schmults to Jim Connor (Apr. 27, 1976), *cited in* DERTHICK & QUIRK, *supra* note 7, at 85 (on file with author).

46. DERTHICK & QUIRK, *supra* note 7, at 71, 75, 85; Thomas Gale Moore, *Regulation: Trucking Deregulation*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, http://www.econlib.org/library/Enc/TruckingDeregulation.html (last visited Feb. 3, 2007).

his term after a finding of malfeasance.[47] Ford was able to take away Timm's chairmanship, and in December 1974 administration aides told Timm that the president would not reappoint him chairman. They tried to convince Timm to resign, but he refused.[48] Timm remained on the commission for another year, but Ford gave the chairmanship to CAB commissioner Richard O'Melia on January 1, 1975.[49]

Ford received formidable support for airline deregulation from Democratic Senator Ted Kennedy. Kennedy convinced one of the prominent proponents of deregulation, a young Harvard law professor named Stephen Breyer, to join his staff in August 1974. Breyer was a perceptive critic of regulation who understood that the market could not be replicated by economic models.

> Efforts, both here and abroad, to have people guess what the market would produce if it were free to create a price are so very different in their result from what the market does produce when it is free that it becomes a kind of parody of a free market situation.[50]

Breyer knew that he wanted to attack regulation, but he was unsure where to begin until the morning of September 27, when he read in the *Washington Post* that Secretary of Transportation Claude Brinegar had called a meeting with the major airlines to discuss how to help Pan Am. Shortly after Breyer walked into the meeting, he was shocked to hear Brinegar extort the airlines to fix prices. "Raise your prices! What's wrong with you airlines?" Brinegar then asked the visitors to leave so the airlines could reach an agreement in private. When he returned to Capitol Hill, Breyer told Kennedy that he had seen a classic case of price fixing: "It was a cartel, a simple cartel being organized by the government."[51] Breyer suggested that Kennedy's Subcommittee on Administrative

47. Memorandum from Dean Burch to Philip W. Buchen (Sept. 20, 1974) (on file with author); Letter from Robert Timm to Philip Buchen (Sept. 9, 1974) (on file with author); Memorandum from Dean Burch to Philip W. Buchen (Sept. 5, 1974) (on file with author).

48. Letter from Robert Timm to Philip Buchen (Dec. 19, 1975) (on file with the Gerald R. Ford Presidential Library, John E. Robson Papers, Box 5, Folder: "C.A.B. – Timm, Robert (material relating to W.H. efforts to force Timm's resignation from Board, and Dept. of Justice investigation of Timm's conduct)"); Notes Gerald R. Ford Presidential Library (John E. Robson Papers, Box 5, Folder: "C.A.B. – Timm, Robert (2).").

49. President Gerald R. Ford, Remarks at the Swearing in of John E. Robson as Chairman of the Civil Aeronautics Board (Apr. 21, 1975); *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4854; Letter from Robert Timm to Philip Buchen (Dec. 19, 1975) (John E. Robson Papers, Box 5, Folder: "C.A.B. – Timm, Robert (material relating to W.H. efforts to force Timm's resignation from Board, and Dept. of Justice investigation of Timm's conduct)").

50. *Commanding Heights: Up for Debate: Deregulation*, *supra* note 24. Breyer had not even seen the absurd results of the FCC's USF models when he made the comment.

51. STURKEN & GLAB, *supra* note 24, at 34.

Practice and Procedure hold hearings on airline regulations.

> I just simply went over there and went to the meeting. And I sat in on a meeting, and the Secretary of Transportation was encouraging all the industry to raise its prices in order to make more money and to stop competition. . . . I thought, well, maybe we could have a hearing on this very meeting. Why is the President on the one hand saying, "Keep prices down," and the Secretary of Transportation, on the other hand, is trying to raise the price? And we did have that hearing.[52]

Kennedy held round one of hearings in November 1974, focusing on the CAB rules for charter airlines. On the first day, Deputy Attorney General Keith Clearwaters testified that the administration opposed minimum charter rates and that the commission's effort to broker a deal to raise rates was illegal: "No justification whatever has been shown for government-sanctioned price fixing in the charter industry."[53]

The star witness that day was Sir Freddy Laker, who was trying to get permission to fly cheap flights (approximately $500 in today's money for a one-way ticket) between London and the United States. In his testimony, Laker called the obsession for saving Pan Am "PanAmania."[54] Laker was not asking for handouts from the government or the incumbent airlines; he just wanted to compete. It was not a fight of good against evil, but that was not the way regulators saw it. Traditionalists at the CAB thought that they were protecting the broad-base of shareholders and unionized employees at the incumbent airlines against a rich man who wanted to undercut the incumbents with inferior service and cheap, non-union labor. That belief drove many decisions that appear in retrospect to be nonsensical, but that were made with sincere and honest intent. Many of the telecommunications decisions of the last ten years will look as baffling in the future, as historians struggle to understand why regulators intentionally gave advantages to companies owned by enormously rich individuals over those owned by institutional investors like TIAA-CREF.

Kennedy began round two of the hearings in February 1975. This time the subject was the entirety of airline regulations. On the first day, Acting Secretary of Transportation John Barnum testified on behalf of the administration that the time was ripe for change, saying "I believe we

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52. *Commanding Heights: Up for Debate: Deregulation*, *supra* note 24.

53. *Airline Charter Fares: Hearings before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 93rd Cong. 212 (1975) (statement of Kenneth I. Clearwaters).

54. *Id*. at 190.

are now at a regulatory watershed."[55]

It took a tragedy for the media to give the hearings prominent coverage. Breyer's investigators had convinced a staffer named William Gingery to provide copies of confidential CAB documents, but a few days before his scheduled testimony, Gingery was found dead in his apartment. He had shot himself, leaving a 20-page suicide note filled with invective about his superiors at the commission. Suicide is usually caused more by underlying depression than by any single event, but according to Gingery's note, documents he found in a safe the Friday before his testimony pushed him over the edge. "Last Friday I learned that I am a fool." The documents showed that Timm had ordered O'Melia (then head of the enforcement bureau) to close an investigation into airlines slush funds for illegal contributions.[56] In the days after the suicide, the hearing room was packed with reporters.[57] Timm denied ever telling O'Melia to shut down the investigation, but his testimony contradicted by O'Melia and several CAB investigators.[58]

The next dramatic event occurred when Kennedy and Breyer proved that CAB officials were lying when they testified that there was no moratorium on new route awards. Breyer's investigators unearthed a memorandum from an administrative law judge referring to "informal instructions of the chairman's office in connection with the unofficial moratorium on route cases."[59] Timm continued to deny the existence of any moratorium, but his convoluted testimony was hardly credible. O'Melia admitted the existence of the moratorium.[60] "In fact, as far as I am concerned, there is no route moratorium as of now."[61] Breyer thought that O'Melia's admission was a seminal event. "Deregulation began at

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55. *Id,* at 4-22 (statement of John W. Barnum), *Id.* at 34–56 (statement of Thomas E. Kauper).

56. *C.A.B. Aide is Dead in Apparent Suicide*, N.Y. TIMES, Feb. 19, 1975, at 37; *C.A.B. Aide Faults Airlines on Election Laws*, N.Y. TIMES, Mar. 3, 1975, at 51; David Burnham, *2 U.S. Aides Back Suicide Note Saying C.A.B. Chief Cut Off Politics Inquiries,* N.Y. TIMES, Mar. 5, 1975, at 18; DERTHICK & QUIRK, *supra* note 7, at 44; STURKEN & GLAB, *supra* note 24, at 41-43.

57. David Burnham, *It Took a Suicide Note*, N.Y. TIMES, Mar. 30, 1975, at 142; STURKEN & GLAB, *supra* note 24, at 43.

58. *Airline Charter Fares: Hearings before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 93rd Cong. 2374-84 (1975) (testimony of CAB Chairman Robert Timm); *Id.* at 2303–2323 (testimony of Stephen Alterman); *Id.* at 2326–2329 (testimony of Robert F. Rickey).

59. BREYER, *supra* note 5, at 338.

60. *Airline Charter Fares: Hearings before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 93rd Cong. 1358 (1975) (testimony of Richard J. O'Melia) ("There was a memorandum apparently stating that the former Chairman, Secor Browne, said there should be an unofficial route moratorium. I think the language of the memo goes one, which indicated to the chief examiner to sit on them for a while.").

61. *Id.* at 648–49.

that moment."[62]

In the hearings' final report, Breyer was harsh in his indictment of CAB commissioners, declaring that the hearings revealed "a strong likelihood of highly improper and possibly criminal behavior on the part of the Board members themselves."[63] In response to Breyer's report, Kennedy and Ford exchanged letters promising to work together for deregulation, and they each submitted deregulatory legislation.[64]

Timm's testimony was the last straw for Ford, who decided to remove him from the commission. When Timm again refused to resign, the White House sent him notice of a hearing to determine whether the president would remove him from office.[65] Timm did not go quietly. He accused the White House of intervening in the affairs of the CAB and leveled wild accusations against fellow board members.[66] On December 5, Buchen sent Timm a letter setting forth the charge of obstructing the investigation of airline campaign contributions and making false statements to investigators and Congress. Timm finally resigned on December 10, 1975.[67]

Within a month of the end of the hearings, Ford appointed John Robson as chair of the CAB.[68] Before he took office, Robson was "objective and agnostic" about deregulation, but he quickly became a supporter.[69] Two weeks before he took office, the United States Circuit Court for the District of Colombia court had voted in favor of competition, ruling that the commission could not deny route

62. STURKEN & GLAB, *supra* note 24, at 44-45. For discussions of the impact of O'Melia's testimony, *see* BREYER, *supra* note 5, at 337; STURKEN & GLAB , *supra* note 24, at 44; *Kennedy Denounces C.A.B. Moratorium on New Route Competition for Airlines*, N.Y. TIMES, Feb. 27, 1975, at 69.

63. DERTHICK & QUIRK, *supra* note 7, at 50; STURKEN & GLAB, *supra* note 24, at 48.

64. David Burnham, *Ford Lauds Panel for C.A.B. Report*, N.Y. TIMES, Feb. 22, 1976, at 22. *See* DERTHICK & QUIRK, *supra* note 7, at 52; President Gerald R. Ford, President's Special Message to the Congress Proposing Reform of Airline Industry Regulation, (Oct. 8, 1975), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=5314.

65. Letter from Roderick Hills to Robert D. Timm (Oct. 17, 1975) (on file with the Gerald R. Ford Presidential Library, John E. Robson Papers, Box 5, Folder: "C.A.B. – Timm, Robert (2).").

66. Letter from Robert Timm to Philip Buchen and Notes on "Meeting Ex Session 12/16/75" (Dec. 19, 1975) (on file with the Gerald R. Ford Presidential Library, John E. Robson Papers, Box 5, Folder: "C.A.B. – Timm, Robert (material relating to W.H. efforts to force Timm's resignation from Board, and Dept. of Justice investigation of Timm's conduct)).

67. Letter from Philip Buchen to Robert D. Timm (Dec. 5, 1975) (on file with the Gerald R. Ford Presidential Library, John E. Robson Papers, Box 5, Folder: "C.A.B. – Timm, Robert (2)."); Letter from Robert D. Timm to the President (Dec. 10, 1975) (on file with the Gerald R. Ford Presidential Library, John E. Robson Papers, Box 5, Folder: "C.A.B. – Timm, Robert (2).")

68. President Gerald R. Ford, President's Remarks at the Swearing in of John E. Robson as Chairman of the Civil Aeronautics Board (Apr. 21, 1975), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4854.

69. *See generally*, Robson, *supra* note 24, at 17.

applications without considering the public benefits of additional competition.[70] Robson took the hint.

On July 6, 1975, Robson announced that the CAB would "assess the operation of the US domestic air transport system under limited or no regulatory constraints." On the same day, the CAB announced that it would begin an experiment allowing airlines to raise or lower prices within "zones of reasonableness" and to enter and exit specified routes without permission.[71] At the end of July, the CAB issued a staff report recommending deregulation within five years.[72] In August—and again a year later—the commission liberalized charter rules.[73] In September, the CAB finally granted several new routes to airlines, and it continued to approve new routes throughout Robson's tenure.[74] In April 1976, the CAB commissioners unanimously announced that they supported deregulation.[75] Not all of the commissioners actually supported deregulation, but they supported Robson, as he explained, out of "an amalgam of persuasion, loyalty, fear of political retribution, institutional pride, and tactic."[76]

In March 1977, the CAB allowed Texas International to charge discounted "Peanuts" fares and American to charge "Supersaver" fares. The discount prices seem high today—round-trip coast-to-coast tickets cost the equivalent of $750 to $900 in today's dollars—but at the time they were significantly lower than other available fares. By 1978, discount fares were widely available, prices had fallen by 8 percent, and air traffic had increased by 17 percent.[77] Robson believed that the law restrained his ability to impose further deregulation without

70. Continental Airlines v. Civil Aeronautics Bd., 519 F.2d 944 (D.C. Cir. 1975).

71. Richard Witkin, *C.A.B. Acts to Ease Curbs on Airlines' Competition*, N.Y. TIMES, July 8, 1975, at A1.

72. ROY PULSIFER, ET AL., CIVIL AERONAUTICS BOARD, REPORT OF THE CAB SPECIAL STAFF ON REGULATORY REFORM (1975); *CAB Should Curtail Regulatory Duties, Staff Report Urges*, WALL ST. J., July 23, 1975, at 8; Richard Witkin, *C.A.B. Offers Plan Easing Fare Curbs*, N.Y. TIMES, July 23, 1975, at 30; Jeffrey W. Hayes, Airline Deregulation: A Financial Markets Perspective on Who Mattered When 4 (Aug. 16, 1998), *available at* http://polmeth.wustl.edu/retrieve.php?id=314.

73. *See Charter-Flight Rule Revisions Adopted by CAB*, WALL ST. J., Aug. 11, 1975, at 8; *CAB Loosens Curbs For Air Charters; Plan to Start Oct. 7*, WALL ST. J., Sept. 3, 1976, at 8; Ralph Blumenthal, *Air Charter Plan Approved By C.A.B. Cuts Restrictions*, N.Y. TIMES, Sept. 3, 1976, at A1.

74. *See CAB Adds Carriers To Routes Serving Omaha, Des Moines*, WALL ST. J., Sept. 10, 1975, at 3. *See also CAB Official Favors Washington-Cincinnati Route for 2 Airlines*, WALL ST. J., Mar. 16, 1977, at 21.

75. Robson, *supra* note 24, at 18

76. DERTHICK & QUIRK, *supra* note 7, at 88-89.

77. *A Discount Air Fare to Coast Approved*, N.Y. Times, Mar. 16, 1977, at 14; *CAB to Let American Air Try Lower Fare on New York-California Runs for a Year*, WALL ST. J., Mar. 16, 1977, at 6; KAPLAN & DAYTON, *supra* note 14, at 3; Moore, *supra* note 23; Sinha, *supra* note 12.

congressional action, but the D.C. Circuit disagreed. Robson's CAB had denied the application of World Airlines to fly regularly-scheduled flights, because Robson thought he did not have the authority to approve the application.[78] The court reversed the order, telling the CAB that existing law gave it the authority to allow charter airlines to fly scheduled routes.[79]

Meanwhile, Congress worked on clarifying Robson's power to lift regulations. In April 1976, hearings were held on the Ford and Kennedy bills before the Senate Aviation Subcommittee chaired by Nevada Democrat Howard Cannon. Robson made a big impact on Cannon when he asserted that regulations hurt the airlines financially, stating "[w]e are concerned that the present regulatory system may have great difficulty in coping successfully with the future."[80] Ford's Secretary of Transportation William Coleman agreed: "There must be fundamental changes. . . . We believe the fault clearly lies in the regulatory system."[81] One airline broke with its brethren and told the commission that regulations hurt the industry. Because United was the largest airline, the CAB had discriminated against it in awarding new routes, and United President Edward Carlson testified that his company supported deregulation. "United could be comfortable with total deregulation in contrast to what we have now."[82]

After the testimony of Robson, Coleman and Carlson, Cannon announced his support for reform.[83] The committee was still considering the deregulation bills when Ford left office.

V. CARTER'S EFFORTS TO DEREGULATE TRANSPORTATION

Carter's experiences running a small business taught him to hate regulations. "As a farmer and a small businessman, and later as a Governor, I shared this resentment and frustration. I resented the cost of Government red tape, the interference it represented in my business and

78. *World Airways Denied Scheduled Runs, But CAB Suggests Congress Study Issue*, WALL ST. J., Jan. 26, 1976, at 5. *See also A Coast-to-Coast Fare of $89 May Never Come*, WALL ST. J., Apr. 15, 1975, at 1.

79. World Airways, Inc. v. C.A.B., 547 F.2d 695, 699-701 (D.C. Cir. 1975).

80. *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the S. Comm. on Commerce*, 94th Cong. 347 (1976) (statement of Hon. John E. Robson).

81. *Id.* at 220-30 (statement of Hon. William Coleman).

82. *Id.* at 531 (statement of Edward Carlson, Chairman and Chief Executive Officer, United Air Lines, Inc.). For discussions of the impact of United's change in position, *see* DERTHICK & QUIRK, *supra* note 7, at 99-100, 157; William Carley, *Major Split Develops Among Airlines as Congress Sets Deregulation Hearings*, WALL ST. J., Mar. 17, 1977, at 4; Richard Witkin, *United Airlines President Backs Proposals for Regulatory Reform*, N.Y. TIMES, Mar. 17, 1977, at 104.

83. Hayes, *supra* note 72, at 4; Cohen & Dolan, *supra* note 7, at 199.

personal life, and not least of all, having to deal with the bureaucratic gobbledygook itself."[84]

During his presidential campaign, Carter promised to pursue deregulation. "The reform of our regulatory agencies would be one of the highest priorities of a Carter Administration."[85] In an address to Ralph Nader's Public Citizens' Forum, Carter promised to appoint regulatory commissioners who supported competition.[86] His campaign statements singled out transportation for reform. "The chief impediments against more effective utilization of the existing system are physical deterioration and outmoded regulations."[87] Carter was less inclined, however, to lift regulations on oil: "There is no need to, and I oppose efforts to, deregulate the price of old oil."[88] Carter's first inclination was to repeat the mistakes made in oil regulation with natural gas, lifting controls on only "new" gas. "I have advocated the deregulation of new natural gas for a limited period of time—four to five years."[89] When he took office, Carter promised a "new spirit of openness, simplicity and clarity" in regulation.[90]

For his first appointment to a regulatory commission, Carter fortuitously chose someone who shared his deregulatory views. Carter replaced ICC Chairman George Stafford with Commissioner A. Daniel O'Neal, who until that time was considered to be against deregulation, but who championed deregulation once in office.[91] There was no question that Carter deliberately chose a proponent of deregulation for his next appointment when he convinced New York Public Utilities

84. President James E. Carter, Statement on Executive Order 12044 (Mar 23, 1978), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=30540.

85. Governor James E. Carter, Response to Questions from the Association for Cooperation in Engineering (Aug. 6, 1976), *reprinted in* THE PRESIDENTIAL CAMPAIGN OF 1976: JIMMY CARTER 855 (1978).

86. Governor James E. Carter, Address to Ralph Nader's Public Citizens' Forum (Aug. 9, 1976), *reprinted in* THE PRESIDENTIAL CAMPAIGN OF 1976: JIMMY CARTER, 478–79 (1978).

87. Governor James E. Carter, Proposal to the Platform Committee of the Democratic Party (June 16, 1976), *reprinted in* THE PRESIDENTIAL CAMPAIGN OF 1976: JIMMY CARTER, 235 (1978).

88. *Id.*

89. *Issues for Investors*, FINANCIAL WORLD, Sept. 15, 1976, *reprinted in* THE PRESIDENTIAL CAMPAIGN OF 1976: JIMMY CARTER, 795 (1978).

90. Letter from the President to the Heads of Independent Regulatory Agencies (Mar. 23, 1978) (improving government regulations).

91. President James E. Carter, Announcement of Interstate Commerce Commission Designation of A. Daniel O'Neal as Chairman (Apr. 5, 1977), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=7297; DERTHICK & QUIRK, *supra* note 7, at 66 n.14; KIMBERLY VACHAL, UPPER GREAT PLAINS TRANSPORTATION INSTITUTE, THE INTERSTATE COMMERCE COMMISSION: PAST AND PRESENT 8 (Mar. 1993), *available at* http://www.ugpti.org/pubs/pdf/SP111.pdf; Moore, *supra* note 23, at 6-8. Prior to appointing him chairman, Carter asked O'Neal only one vague question about deregulation.

Commission Chairman Alfred Kahn to take over the CAB.[92] Kahn's support of deregulation was well known. He summed up his philosophy in testimony to Congress. "The superiority of open markets . . . lies in the fact that the optimum outcome cannot be predicted."[93] Two years earlier, he had told Congress that regulations should be eliminated in the transportation industry. "Transportation is the leading example of an area in which a substantial dose of deregulation, and perhaps something close to complete deregulation, is long overdue.[94] Elizabeth Bailey, Carter's next appointment to the CAB, had no hesitations about joining Kahn's deregulatory cause.[95] And Carter proclaimed that he would continue to choose deregulatory proponents.

> I am very proud that the ICC Chairman, Dan O'Neal, has been staunch in moving to deregulate the trucking industry. I back him in this. I realize the independence of the regulatory agencies, but with my own voice, my own influence, my future appointments to the ICC, my intention is to continue this trend.[96]

Carter was good to his word. In 1979, he appointed three deregulation proponents to the ICC, Darius B. Gaskins, Marcus Alexis and Thomas Trantum. Later that year, Carter made Gaskins chair.[97]

When he took over the CAB in May 1977, Kahn set out to achieve "something as close to total deregulation as the law will permit, to be achieved as quickly as possible."[98] He told his staff that they "were going

92. President James E. Carter, Announcement of Civil Aeronautics Board Nomination of Alfred E. Kahn to be a Member (May 19, 1977), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=7532; DERTHICK & QUIRK, *supra* note 7, at 69.

93. *Hearing before the Subcomm. on Aviation of the H. Comm. on Public Works and Transportation*, 95th Cong. (testimony of Alfred E. Kahn), *cited in* DERTHICK & QUIRK, *supra* note 7, at 124 (emphasis in original).

94. Albert R Karr, *Nominee for CAB Holds Outspoken Regulatory Views*, WALL ST. J., May 20, 1977, at 14.

95. President James E. Carter, Announcement of Civil Aeronautics Board Nomination of Elizabeth E. Bailey to be a Member (July 7, 1977), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=7769.

96. President James E. Carter, Business Council Remarks and a Question-and-Answer Session at a Meeting of the Council (Dec. 13, 1978), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=30299.

97. President James E. Carter, Announcement of Interstate Commerce Commission Designation of Darius W. Gaskins, Jr., as Chairman (Oct. 12, 1979), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=31521; President James E. Carter, Announcement of Interstate Commerce Commission Nomination of Marcus Alexis to be a Member (May 17, 1979), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=32359; President James E. Carter, Announcement of Interstate Commerce Commission Nomination of Two Members (May 16, 1979), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=32347.

98. DERTHICK & QUIRK, *supra* note 7, at 73.

to get the airline eggs so scrambled that no one was ever going to be able to unscramble them."[99] Kahn's goal was not meaningfully different from Robson's; they both believed that the ultimate goal was deregulation of the airlines. Where they differed was in how to accomplish that goal. Robson thought that deregulation had to wait for congressional action, while Kahn was willing to use his powers as chairman to implement change. "We'll do what we can, until somebody says we can't."[100] Kahn later explained the difference between his approach and Robson's, noting that "the main difference between the preceding chairman and me was not on the general efficacy of deregulation, he had in fact come out in favor of it, but in his attitude toward moving before a bill. Now in that he was extraordinarily conservative."[101]

Under Kahn, the CAB approved all new route applications.[102] In 1978, the commission lifted restrictions on charter companies, allowed airlines to lower fares up to 50% without board approval, and eliminated its requirement that first class fares be 50% higher than coach fares.[103]

Airline deregulation also worked its way through Congress. Carter signed the Air Cargo Deregulation Act on November 9, 1977, and deregulated air freight.[104] Deregulation of passenger traffic took longer; Carter pushed deregulation on Capitol Hill for almost two years.[105] When the Cannon committee continued hearings in 1977, Charles Schultze, the chairman of Carter's Council of Economic Advisors, testified that the administration fully supported the Kennedy and Cannon deregulation bills.[106] The Cannon committee finally approved a bill on October 27,

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99. Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 331 (Summer 1990).

100. Ernest Holsendolph, *The Airlines Try to Cope With Freedom: The Rulings of Alfred E. Kahn, C.A.B. Chairman Have Fueled the Competitive Fires*, N.Y. TIMES, Apr. 23, 1978, at F7 (quoting Alfred E. Kahn, professor at Cornell University).

101. Interview with Alfred E. Kahn for Jimmy Carter Oral History Project, *cited in* Cohen & Dolan, *supra* note 7.

102. *See* DERTHICK & QUIRK, *supra* note 7, at 149; Sinha, *supra* note 11; *see also* Albert R. Karr, *CAB Moves to Throw Routes Wide Open for Competition in Reversal of Policy*, WALL ST. J., May 8, 1978, at 3.

103. Sinha*, supra* note 11*; see Sharp Relaxing of Air-Fare Regulations Planned by CAB in Drive to Cut Controls*, WALL ST. J., Apr. 4, 1978, at 8; *CAB Will Liberalize Stance on Accepting Carter-Route Bids*, WALL ST. J., July 31, 1978, at 24.

104. Act of Nov. 9, 1977, Pub. L. No. 95-163, 91 Stat. 1278 (codified as amended in scattered sections of 26 and 49 U.S.C.); *see also* President James E. Carter, Federal Mine Safety and Health Amendments Act of 1977 and Air Cargo Deregulation Bill Remarks on Signing S. 717 and H.R. 6010 into Law (Nov. 9, 1977), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=6905.

105. Cohen & Dolan, *supra* note 7.

106. *Regulatory Reform in Air Transportation: Hearing on S .292 and S. 689 Before S. Subcomm. on Aviation of the S. Comm. on Commerce, Science, and Transportation,* 95th Cong. (1977) (statement of Charles Schultze, Chairman, President Carter's Council of Economic Advisors).

1977.[107] The Senate followed, passing the bill almost without dissent.[108]

Georgia Democrat Elliott Levitas held up the bill when it arrived in the House Aviation Subcommittee, refusing to act against the wishes of Atlanta-based Delta Airlines. Levitas thought he was adding a poison pill to the bill when he proposed an amendment for the CAB to sunset. Levitas sold the provision to airline executives by explaining that it would force Congress to reconsider deregulation by the time the CAB was scheduled to be dissolved.[109] Carter convinced Speaker Tip O'Neill to intervene, and the bill passed out of committee in May.[110] The House passed a bill in September, including the provision for the CAB to sunset. Carter signed the Airline Deregulation Act of 1978 on October 24, noting that "[f]or the first time in decades, we have deregulated a major industry."[111]

Under the new law, the CAB's ability to restrict entry and exit ended in December 1981, CAB price jurisdiction ended in January 1983, and the CAB itself was dissolved at the end of 1984.[112] When Carter signed the act, a CAB staffer told airline executives that the board would issue certificates for new routes "like confetti."[113] The CAB gave airlines price freedom two years early.

Carter's appointees to the ICC pushed deregulation as hard as Kahn did. In 1977, the D.C. Circuit Court held that the ICC could not deny new route applications without first considering the benefits of additional competition.[114] O'Neal took the court's direction and began to allow competition. "It appears that the goals of this program can be reached through administrative actions alone. While legislation confirming the administrative actions could be drafted, we do not believe it is necessary."[115] In 1979, the board approved 98 percent of route

107. President James E. Carter, Domestic Airline Industry Statement on Action by the Senate Committee on Commerce, Science, and Transportation to Reduce Regulation of the Industry (Oct. 27, 1977), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=6850.

108. *Fighting Inflation at 30,000 Feet*, N.Y. TIMES, Apr. 24, 1978, at A22; Albert R. Hunt, *Senate Votes 83-9 to Substantially Reduce Airline Regulation to Boost Competition*, WALL ST. J., Apr. 20, 1978, at 5.

109. DERTHICK & QUIRK, *supra* note 7, at 160–62.

110. Albert R. Karr, *Scare Talk about Deregulation*, WALL ST. J., May 9, 1978, at 26.

111. President James E. Carter, Airline Deregulation Act of 1978 Remarks on Signing S. 2493 into Law (Oct. 24, 1978), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=30038; *Bill Deregulating Airline Industry Clears Conferees*, WALL ST. J., Oct. 9, 1978, at 2.

112. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 45 and 49 U.S.C.); Moore, *supra* note 23; *see generally,* DERTHICK & QUIRK, *supra* note 7, at 69, 88-89, 97, 124.

113. Albert R. Karr, *Carter Signs Airline-Deregulation Law; CAB Will Grant Routes More Generously*, WALL ST. J., Oct. 25, 1978, at 2; *see* KAPLAN & DAYTON, *supra* note 14.

114. DERTHICK & QUIRK, *supra* note 7, at 67-68.

115. INTERSTATE COMMERCE COMMISSION, INITIAL REPORT OF THE MOTOR CARRIER

applications. Congress balked at the pace of deregulation. During hearings to confirm him as chair, congressional leaders compelled from Gaskins a promise to hold up further deregulation until June 30, 1980 to give Congress time to pass legislation.[116] But Carter had already begun the legislative process on June 21, 1979 when he submitted legislation to deregulate trucking.[117]

The Cannon committee was the first stop for Carter's bill, and the fight over the legislation was fierce and dirty. The Teamsters even tried to bribe Senator Cannon. Teamsters President Roy Williams and Allen Dorfman, a Chicago businessman with mob connections, were caught on tape admitting that they tried to bribe him, and they were convicted of conspiracy in December 1982.[118] Despite fierce opposition, Carter continued to push his legislation, warning Congress that he would veto any bill that would roll back the commission's deregulatory actions. Congress responded with legislation to Carter's liking.[119]

In July 1980, Carter signed the Motor Carrier Act, which lifted most restrictions on entry, on the goods truckers could carry, and on the routes they could travel. Truckers were free to set prices within a "zone of reasonableness." Unfortunately, the Byzantine rules requiring truckers to file tariffs were not lifted, and state commissions continued to limit entry and regulate prices.[120] Although the Act did not completely lift regulations, it did the next best thing by allowing market entry. The ICC commissioners used the flexibility granted by the act to revolutionize the industry.[121] Rates fell, and trucking companies multiplied. Deregulation was completed during the Clinton administration, when the Trucking Industry Regulatory Reform Act of 1994 eliminated the rate-filing requirement for trucking companies and preempted state jurisdiction over intrastate trucking prices.[122] A year later, Congress dissolved the ICC.[123]

TASK FORCE 36 (May 1979), *cited in* VACHAL, *supra* note 91, at 9.

116. *See* VACHAL, *supra* note 91, at 9.

117. President James E. Carter, Trucking Industry Deregulation Remarks Announcing Proposed Legislation (June 21, 1979) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=32506.

118. *See* Lombardo v. United States, 865 F.2d 155, (7th Cir. 1989); DERTHICK & QUIRK, *supra* note 7, at 169; *see also* Ben A. Franklin, *Teamster Trial Goes to the Jury*, N.Y. TIMES, Dec. 12, 1982.

119. *See* DERTHICK & QUIRK, *supra* note 7, at 6; Moore, *Trucking Deregulation*, *supra* note 46.

120. *See* Moore, *Trucking Deregulation*, *supra* note 46. *See generally* DERTHICK & QUIRK, *supra* note 7, at 6, 73, 149-50; VACHAL, *supra* note 91, at 9; Moore, *supra* note 23.

121. DERTHICK & QUIRK, *supra* note 7, at 97; Moore, *supra* note 23.

122. Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1673 (codified as amended in scattered sections of 23 and 49 U.S.C.).

123. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in scattered sections of 2, 5, 11, 15, 16, 23, 26, 28, 39, 42, and 49 U.S.C.); *see also* President William J. Clinton, Statement on Signing the ICC Termination Act of 1995 (Dec. 29,

Three months after signing the trucking bill, Carter signed a bill deregulating moving companies. The Household Goods Transportation Act of 1980 gave the ICC authority to allow pricing freedom, but required moving companies to continue filing rates. The Act also allowed carriers to guarantee pick-up and delivery times, and to offer insurance for lost or damaged goods. Prior to the Act, a moving company was not allowed to give binding quotes or accept any form of payment other than cash or certified check. The Act allowed companies to accept payment by check or credit card.[124] Carter proposed deregulation of busing, but regulations were not lifted until the Reagan administration, with the Bus Regulatory Reform Act of 1982. Like trucking, busing was not completely deregulated until the ICC was abolished. Also like trucking, the key was allowing entry which caused rates for long bus trips to fall.[125]

In 1979, the ICC began using its authority under the 1976 railroad legislation to lift restrictions on entry and controls over prices.[126] Carter submitted a bill to further deregulate the railroads in 1979, motivated in part by fear that the government would be obligated to nationalize the railroads.[127] Carter pushed the bill for most of the 1980 campaign year, and Congress finally passed a bill at the end of his administration. Carter signed the Staggers Rail Act on October 14, 1980, calling it the "capstone" of his deregulatory efforts.

> The Staggers Rail Act of 1980 is the capstone of my own efforts to get rid of needless and burdensome Federal regulations which benefit nobody and which harm all of us. This effort is crucial to promote more competition, to improve productivity, and to hold down inflation. We deregulated the airlines, we deregulated the trucking industry, we deregulated financial institutions, we decontrolled oil and natural gas prices, and we negotiated lower trade barriers throughout the world for our exports.[128]

1995), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=52436.

124. Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011 (codified as amended in scattered sections of 26, 28, and 49 U.S.C.); *see* Thomas Gale Moore, *Clearing the Track: The Remaining Transportation Regulations*, 18 REG., Spring 1995, *available at* http://www.cato.org/pubs/regulation/reg18n2f.html.

125. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified as amended in scattered sections of 5, 26, 31, and 49 U.S.C.); Moore, *supra* note 124.

126. *See* Moore, *supra* note 23, at 7.

127. *See* President James E. Carter, Freight Rail Industry Deregulation Message to the Congress Transmitting Proposed Legislation (Mar. 23, 1979), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=32085.

128. President James E. Carter, Staggers Rail Act of 1980 Remarks on Signing S. 1946 into Law (Oct. 14, 1980), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=45283.

The Staggers Act allowed the ICC to exempt railroad traffic from rate regulation if it found that regulation was not necessary to protect shippers from monopoly power—only rates to "captive shippers" remained regulated.[129] The ICC used its authority aggressively, exempting most rail traffic, but coal and grain producers have used the "captive shippers" provision to maintain artificially low rates for the past 30 years.[130]

Other aspects of the law that fell short of complete deregulation. Fifty years after the railroad companies were able to dominate anything, they were still subject to more regulation than their competitors. The railroads were still required to file rates and contracts, which the commission could reject, and railroads needed approval to build new track or abandon old tracks. The most important aspect in which the Staggers Act fell short of full deregulation was that it did not eliminate all barriers to entry in the transportation industry. Even today, railroads need approval to ender any new area of business, they are forbidden to carry their own commodities, and they cannot own trucking companies.[131]

VI. FORD'S FIGHT TO DEREGULATE OIL AND GAS

One of the first issues Ford turned to when he took office was what to do about price controls on petroleum products, which were scheduled to expire in June 1975. John Sawhill, the head of the Federal Energy Administration, recommended "progressive deregulation" and "price equalization," making the price of oil the same regardless of where it was produced. But he did not propose simple equalization. Fear of oil companies making "windfall profits" drove him to recommend a "capacity-based entitlement system" that would create "substantial price equalization."[132] Ford's Council of Economic Advisors recommended immediate deregulation.[133] The CEA estimated that deregulation would spur an increase in domestic production by 5 percent, reducing oil imports by 9 to 16 percent. The downside to deregulation was that it would cause a one-time increase in the inflation rate of 0.4 percent.[134]

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129. *See* Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 5 and 49 U.S.C.).

130. *See* Moore, *supra* note 124; Moore, *supra* note 23, at 10.

131. Moore, *supra* note 124.

132. Memorandum from John Sawhill to Kenneth Rush, et al. on Crude Oil Price Equalization (Aug. 12, 1974) (on file at Gerald R. Ford Presidential Library, Kenneth Rush Files, Box 1, Folder: "Crude Oil Price Equalization, August 23, 1974.").

133. Memorandum from Bob Dohner to Gary Seevers on Cost of Crude Price Decontrol (Aug. 12, 1974) (on file at Gerald R. Ford Presidential Library, Kenneth Rush Files, Box 1, Folder: "Crude Oil Price Equalization, August 23, 1974.").

134. *Id.*

Ford agreed with the CEA and decided to push for complete and immediate deregulation of petroleum prices. Ford also told his domestic advisors to "push hard" for deregulation of natural gas during the pending congressional session, but Congress did not act on natural gas until after Ford left office.[135]

The disagreement between Ford and Sawhill came to a head over Sawhill's proposal for a 20-cent-per-gallon tax on gasoline to discourage consumption.[136] Sawhill's proposal would have made the regulatory scheme nonsensical. Instead of allowing the price of gasoline to rise by lifting the price controls, Sawhill proposed a more complex solution, in which the government would simultaneously try to reduce and increase the price of gasoline. The sole purpose of price controls was to keep the price of gasoline artificially low, while the sole purpose of Sawhill's gas tax would have been to increase the price of gasoline. Ford thought that the gas tax increase had no chance in Congress, and he preferred to let gas prices increase naturally by lifting price controls.[137] Sawhill would not give up, and he went public with his proposal on the "Today" show on October 1, 1974. Ford disowned Sawhill's statements and asked him to resign, replacing him with OMB Associate Director Frank Zarb.[138]

On December 27, Ford met in Vail with his energy advisors to consider a series of energy proposals to include in his state of the union speech.[139] They gave him three options: (1) a series of deregulatory legislative proposals, (2) a program of additional governmental controls, and (3) a series of administrative actions to increase the price of domestic oil. His economic advisors recommended option 1, deregulation. Ford had already decided that deregulation was important, but he did not reject the administrative options, which he considered a valuable tool to force Congress to accept deregulation. By allowing the price of oil to rise, he could remove the incentive for Congress to keep controls. Rather than choosing between options 1 and 3, he decided to pursue both. "I will go

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135. Notes and Memorandum for the Record of Michael Raoul-Duval of Meeting with President Ford, Secretary Simon, Secretary Morton, and John Sawhill (Aug. 28, 1974) (on file with the Gerald R. Ford Presidential Library, Michael Raoul-Duval Papers, Box 4, File: "Meeting with the President, 8/28/74, Energy"); REICHLEY, *supra* note 20, at 372-73.

136. FORD, *supra* note 39, at 228.

137. FORD, *supra* note 39, at 229, 241-44. In an October 22, 1974 meeting with Max Fisher, Ford said that Congress would not pass a gas tax aimed at promoting conservation. Notes of Michael Raoul-Duval of Meeting with President Ford (Oct. 22, 1974) (on file with the Gerald R. Ford Presidential Library, Michael Raoul-Duval Papers, Box 4, File: "Meeting with the President, 10/22/74, Max Fisher.").

138. FORD, *supra* note 39, at 229; President Gerald R. Ford, News Conference (Oct. 29, 1974); Letter of President Gerald R. Ford Accepting the Resignation of John C. Sawhill as Administrator of the Federal Energy Administration (Oct. 29, 1974) (on file with author); RICHARD REEVES, A FORD, NOT A LINCOLN 136-37(1975); REICHLEY, *supra* note 20, at 70.

139. Interview with Roger B. Porter, William A. Syers (May 13, 1985) (on file with the Gerald R. Ford Library, William A. Syers Papers, Box 1, Folder "Porter, Roger," p. 1.).

forward with a legislative package on using the market mechanism, getting government out of the business of regulating energy, but at the same time, I'll move simultaneously with the administrative options. . . . And if they don't produce anything, we'll keep the heat on with the administrative package."[140]

Ford explained that allowing the price of oil and natural gas to increase was the only way to effectively discourage consumption. "Painful as they are, higher prices do promote conservation, and higher prices do promote increased efficiency in the use of petroleum products."[141] Greenspan later explained the administration's policy. "We found that there is no alternative to allowing—in fact, encouraging—prices of energy to rise."[142]

On the evening of January 13, 1975, Ford introduced his energy program in a televised fireside chat from the Lincoln Library at the White House, and two days later he gave more details in his 1975 State of the Union address. Ford announced that he would increase the price of domestic oil by $3, in equal increments over three months. Ford also announced that he would be submitting legislation to deregulate oil and natural gas, along with a proposal for a windfall profits tax.[143] Within a week, Democratic Senators Scoop Jackson and Ted Kennedy filed a resolution to block the proposed oil price increases. Ford and Congress were stalemated for the rest of the year. They began a cycle in which Ford imposed price increases on oil. Congress responded by vetoing the price increases and extending the expiring price controls. Ford responded by vetoing the extension, but offering a short extension of the controls so a compromise could be worked out, and the process started over. After several cycles, Congress finally passed an energy bill on December 17.

The bill retained controls on the price of old oil, which was held at $5.25, and controls were again imposed on new oil, rolling the price back to $11.00. After 40 months, the president was given the authority to

140. Interview of Richard B. Cheney, Stephen J. Wayne (June 27, 1975) (on file with the Gerald R. Ford Library, James F. C. Hyde and Stephen J. Wayne Oral History Collection, 1975-1977, Box 1, Folder "Cheney, Richard – Interview, 6/27/75," pp. 8-9); Notes of Michael Raoul-Duval Meeting with President Ford and Others (Dec. 19, 1974) (on file with the Gerald R. Ford Presidential Library, Michael Raoul-Duval Papers, Box 5, File: "Meeting with the President, 12/19/74, Morton, et al.").

141. John Osborne, *White House Watch*, NEW REPUBLIC, Sept. 6, 1975, *reprinted in* Osborne, *supra* note 6, at 180.

142. Address by Alan Greenspan (on file with the Gerald R. Ford Presidential Library, Michael Raoul-Duval Papers, Box 4, File: "Greenspan, Alan.").

143. President Gerald R. Ford, Address to the Nation on Energy and Economic Programs (Jan. 13, 1975); President Gerald R. Ford, Address before a Joint Session of the Congress Reporting on the State of the Union (Jan. 15, 1975). As promised, Ford submitted his omnibus energy bill to Congress on January 30. Letter from President Gerald R. Ford, to the Speaker of the House and the President of the Senate Transmitting Proposed Energy Legislation (Jan. 30, 1975) (on file with author).

gradually eliminate controls. The law also gave the president the authority to eliminate categories of controls, subject to veto by either house. Ford was faced with a tough choice. The price controls had lapsed, and if he vetoed the bill, the controls would stay dissolved. But Congress could pass new controls in 1976, without giving Ford the power to eliminate them over time. Ford's advisors were uncertain whether a veto would be sustained, and they were fairly certain that a new bill would be worse. The positive side of the bill was that it "set a course towards decontrol." Ford chose the ability to gradually deregulate over continuation of the battle with Congress, and he signed the Energy Policy and Conservation Act on December 27, 1975.[144]

The FEA immediately began implementing the deregulatory provisions of the act. "Our goal is deregulation to the maximum extent possible."[145] In 1976, the FEA exercised its authority to lift controls from residential fuel oil, middle distillates, military jet fuel, naphtha, and gas oils. Approximately half of refinery output was decontrolled, but gasoline, natural gas liquids, commercial jet fuel and aviation gasoline were still subject to controls.[146] By the time Ford left office, the FEA had completed hearings on decontrol of gasoline. Zarb gave Ford three options: (1) lift controls in December, so Congress would be forced to act before he left office, (2) lift controls in early January, so the new administration would have 15 days to act once it took office if it disagreed with decontrol, and (3) allow the new administration to make the decision. Congressional leaders asked Ford to allow the incoming

144. FORD, *supra* note 39, at 340-41; Memorandum from Frank Zarb to President Gerald R. Ford concerning Recommendations on Energy Bill (Nov. 7, 1975) (on file with the Gerald R. Ford Presidential Library, Frank Zarb Files, Box 2, File: "Memoranda to the President 11/1/75 – 11/24/75"); Memorandum from Frank Zarb to President Gerald R. Ford concerning Conference Energy Bill (Nov. 10, 1975) (on file with the Gerald R. Ford Presidential Library, Frank Zarb Files, Box 2, File: "Memoranda to the President 11/1/75 – 11/24/75"); Memorandum from William Simon to President Gerald R. Ford concerning The Energy Policy and Conservation Act of 1975 (Dec. 8, 1975) (on file with the Gerald R. Ford Presidential Library, Frank Zarb Files, Box 2, File: "Memoranda to the President 11/25/75 – 12/12/75"); Memorandum from Jim Cannon to Frank Zarb concerning Energy Bill (Dec. 8, 1975) (on file with the Gerald R. Ford Presidential Library, Frank Zarb Files, Box 2, File: "Memoranda to the President 11/25/75 – 12/12/75"); Memorandum from Frank Zarb to President Gerald R. Ford concerning H.R. 7104/S. 622: The Energy Policy and Conservation Act (Dec. 12, 1975) (on file with the Gerald R. Ford Presidential Library, Frank Zarb Files, Box 2, File: "Memoranda to the President 11/25/75 – 12/12/75"); Memorandum from Frank Zarb to President Gerald R. Ford entitled "The Energy Policy and Conservation Act: If You Decide to Veto" (Dec. 16, 1975) (on file with the Gerald R. Ford Presidential Library, Alan Greenspan Files, Box 44, File: "Energy – Legislation.").

145. Memorandum from Frank Zarb to President Gerald R. Ford entitled "Implementation of the Energy Policy and Conservation Act Amendment to the Allocation Act" (Jan. 13, 1976) (on file with the Gerald R. Ford Presidential Library, Frank Zarb Files, Box 2, File: "Memoranda to the President 2/13/76 – 4/16/76.").

146. REICHLEY, *supra* note 20, at 371. Congress had reserved the right to overturn administrative deregulatory action within 15 days, but did not exercise its rights.

administration to make the decision.[147] Ford decided not to wait, but he gave Carter the ability to reverse his decision. On his second-to-last day in office, he eliminated controls on gasoline, but Carter rescinded the action after taking office.[148]

VII. CARTER'S EFFORTS TO DEREGULATE OIL AND GAS

Carter shared Ford's belief that keeping the cost of energy artificially low was a bad policy. "Oil and natural gas . . . are priced domestically below their marginal replacement costs; as a result, the Nation uses them wastefully with little regard to their true value."[149] At first, the prospect of shareholders of oil companies making more money kept Carter from eliminating price controls. For his first energy proposal, Carter turned to the only Republican in his Cabinet, Secretary of Energy James Schlesinger. Schlesinger was a darling of the right wing, and he fancied himself as a keen reader of congressional politics. Schlesinger knew that Carter opposed lifting controls on old oil, and he thought that decontrol had little chance in Congress, so he developed a plan which would have added to the complexity of price controls.[150] Most of Carter's economic and energy advisors objected to the complexity of Schlesinger's proposal and urged Carter to delay any announcement until a new plan could be developed, but Carter decided to go with the Schlesinger plan.[151] Under the plan Carter announced on April 20, 1977, price controls on gasoline would have been eliminated, but the price controls on crude oil would have been more complex, adding a "crude oil equalization tax" to make the price of domestic old oil equal to the price of new and imported oil.[152] Because Carter did not want the shareholders of oil companies to make more money, he proposed a plan that was nonsensical. The price that producers received would have remained the same, so the plan would have done nothing to address the effect the controls had on domestic production. At the same time, the equalization tax would have made the price that refiners paid for old oil equal to the

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147. Memorandum from Frank Zarb to President Gerald R. Ford entitled "Gasoline Decontrol" (Dec. 30, 1976) (on file with the Gerald R. Ford Presidential Library, Frank Zarb Files, Box 2, File: "Memoranda to the President 12/1//76 – 1/20/77.").

148. President James E. Carter, Gasoline Decontrol Announcement of Modification of Federal Energy Administration Regulations (Jan. 24, 1977); REICHLEY, *supra* note 20, at 371.

149. Press Release, Carter Administration, National Energy Program Fact Sheet on the President's Program (Apr. 20, 1977), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=7373.

150. Interview by James Sterling Young et al. with Stuart Eizenstat, in Charlottesville, VA., (January 29-30, 1982), *available at* http://webstorage1.mcpa.virginia.edu/library/mc/poh/jec/transcripts/.

151. JOHN C. BARROW, THE CARTER PRESIDENCY: POLICY CHOICES IN THE POST-NEW DEAL ERA 164-65 (Gary M. Fink & Hugh D. Graham eds., 1998).

152. Press Release, *supra* note 147.

world market price, eliminating any benefit consumers received from the price controls.

Schlesinger also fought hard against deregulation of natural gas—again because he thought it would have no chance in Congress. Carter's chief domestic policy advisor Stuart Eizenstat pushed for deregulation, because he mistakenly believed that Carter had promised to completely deregulate natural gas during the campaign.[153] In fact, Carter had been careful to promise deregulation of "new gas," and he stuck with the misguided distinction between old and new gas after he took office. "I'm not in favor of complete deregulation."[154] He could not overcome his aversion to "massive profits for producers that overnight decontrol would allow."[155]

Gas producers lobbied hard for complete deregulation, but they were unsuccessful in the House, which passed Carter's proposal. Deregulation had more support in the Senate, which passed a bill lifting price controls on natural gas and old oil.[156] Carter objected to those provisions, and he threatened a veto if they survived the House-Senate conference committee. "I will not sign an unfair bill."[157] It took another eight months for the committee to work out a compromise.[158] On November 9, Carter signed the Natural Gas Pricing Act of 1978, which phased out price regulations, but created an even-more-complicated system of interim controls. The law eliminated the artificial distinction between gas sold within states and gas that crossed state lines, ending the natural gas shortages that had plagued the nation.[159]

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153. Interview by James Sterling Young, *supra* note 150.

154. President James E. Carter, News Conference (July 12, 1977) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=7786; *see also* President James E. Carter, National Energy Plan - Address Delivered Before a Joint Session of the Congress (Apr. 20, 1977), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=7372; President James E. Carter, The Energy Shortage Remarks and a Question-and-Answer Session at the Westinghouse Plant in Pittsburgh, Pennsylvania (Jan. 30, 1977), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=7311. Schlesinger later explained that he thought that removing the natural gas caps was not politically feasible. *See* Interview by James Sterling Young, *supra* note 150.

155. White House Statement, Carter Administration, Natural Gas Legislation White House Statement (Aug. 25, 1978) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=31232.

156. *Senate Avoids Vote on Natural Gas Price*, N.Y. TIMES, Sept. 25, 1977, at 21; Steven Rattner, *Gas Filibuster Ends as Byrd Overrides Customs of Senate*, N.Y. TIMES, Oct. 4, 1977, at 77.

157. President James E. Carter, Natural Gas Deregulation Statement on Senate Action (Oct. 4, 1977) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=6746.

158. *See* President James E. Carter, Natural Gas Legislation Remarks on the Congressional Conference Committee Report on the Legislation (Aug. 18, 1978), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=31202; White House Statement, *supra* note 153.

159. *See* Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified as amended in scattered sections of 5, 12, 15, 16, and 42 U.S.C.); President James E. Carter,

President Reagan petitioned Congress to eliminate the remaining controls on natural gas, and legislation finally passed lifting the price controls during the administration of the first George Bush in 1989.[160]

Carter was forced to revisit his support for price controls on crude oil when prices spiked after the 1978 revolution in Iran. As of June 1, 1979, Carter had the authority to gradually deregulate the price of oil under the Energy Policy and Conservation Act of 1975. Carter convened a meeting with his advisors at Camp David on March 19. Because Carter had the authority to lift controls by executive action, Schlesinger was not diverted by his tin ear for congressional politics, and he proposed phasing out controls between June 1, 1979 and September 1981, along with a windfall profits tax.[161] Carter agreed and announced his executive action in April 1979. "We still face the basic reality about America's use of oil: We must use less, and we must pay more for what we use."[162]

Carter had finally dropped his energy equalization tax, but he was still concerned about the shareholders of oil companies making too much money, so he proposed a windfall profits tax of 50% of the difference between the price for which a barrel of oil sold on the market and the price at which it would have sold under the price controls.[163] Congress passed the windfall profits tax in March 1980.[164] The tax restored some of the disincentive against production of domestic oil that existed under the price control regime, but Carter's lifting price controls and imposing

National Energy Bills Remarks on Signing H.R. 4018, H.R. 5263, H.R. 5037, H.R. 5146, and H.R. 5289 Into Law (Nov. 9, 1978), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=6746; DERTHICK & QUIRK, *supra* note 7, at 208-11; *Congress and the Nation, Vol. IV, 1973-1976: A Review of Government and Politics*, CONGRESSIONAL QUARTERLY 11 (1977); *see also* MACAVOY, *supra* note 7, at 10.

160. *See* President Ronald W. Reagan, Statement on Transmitting to Congress Proposed Natural Gas Deregulation Legislation (Feb. 28, 1983), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=40984; Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (codified as amended in scattered sections of 15 U.S.C.); President George H.W. Bush, Remarks on Signing the Natural Gas Wellhead Decontrol Act of 1989 (July 26, 1989), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=17354.

161. Interview by James Sterling Young, *supra* note 150; *see also* BARROW, *supra* note 151, at 168–69.

162. President James E. Carter, Remarks at the State Democratic Party's Jefferson-Jackson Day Dinner (Apr. 7, 1979), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=32172.

163. President James E. Carter, Energy Address to the Nation (Apr. 5, 1979), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=32159; *see also* President James E. Carter, News Conference (Apr. 10, 1979), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=32183.

164. Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 (codified as amended in scattered sections of 7, 12, 15, 19, 26, 42, and 43 U.S.C.); *see also* President James E. Carter, Crude Oil Windfall Profit Tax Act of 1980 Remarks on Signing H.R. 3919 Into Law (Apr. 2, 1980) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=33214.

a windfall profits tax was a far better solution than his equalization tax proposal, and it was manifestly better than the price controls he lifted.

When he took office, Reagan accelerated the deregulation process with an executive order that eliminated price controls on oil products, rather than allowing them to be phased out over time.[165] Reagan also pushed hard to eliminate the windfall profits tax, which was repealed in 1988.[166]

POSSIBILITIES FOR TELECOMMUNICATIONS DEREGULATION

After the first step, when the market opened to competition, deregulation of the transportation industry included a second step when regulations and the commissions themselves were eliminated. The Airline Deregulation Act of 1978 phased out all price regulations and dissolved the CAB, and regulation of trucking was finally eliminated by the Trucking Industry Regulatory Reform Act of 1994 and the dissolution of the ICC a year later. A similar second step has not been taken in the communications industry—price regulations remain, along with the regulatory detritus of tariff and contract filing requirements and complex rules governing the relations between competitors.

The Telecommunications Act of 1996 opened the market to competition, but Congress wanted it to do more—the purpose of the Act was to both "promote competition and reduce regulation."[167] The FCC and state commissions have taken to heart Congress's directive to "promote competition," but they have generally ignored the mandate to "reduce regulation."[168] Congress was sincere in 1996 when it said its goal was to reduce regulation, as evidenced by the two powerful tools it gave to the FCC to complete the task: section 10 of the act authorizes the Commission to forbear from any unnecessary sections of the law, and section 11 orders the commission to conduct a review of its regulations every two years and eliminate any that are unnecessary. A Commission committed to deregulation will not be in the same position as Robson, thinking that the law does not allow deregulation, or as Kahn, setting out

165. Exec. Order No. 12,287, 46 Fed. Reg. 9909 (Jan. 28, 1981).

166. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107; *see also* President Ronald W. Reagan, Remarks on Signing the Omnibus Trade and Competitiveness Act of 1988 in Long Beach, California (Aug. 23, 1988), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=36289.

167. Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18, and 47 U.S.C.) ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid growth of new telecommunications technologies.").

168. *See* J. Gregory Sidak, *The Failure of Good Intentions: The WorldCom Fraud and the Collapse of American Telecommunications after Deregulation*, 20 YALE J. ON REG. 207, 211–12 (2003) ("Deregulation has actually increased regulation.").

to "do what we can, until somebody says we can't."

As yet, the FCC has not taken meaningful advantage of its authority to eliminate regulations. But it may be too much to ask for a Commission to voluntarily lift an entire rubric of regulation. In the transportation industry, true deregulation did not occur until the regulatory commissions dissolved. But elimination of the FCC is impractical. In the transportation industry, the CAB and ICC were only responsible for economic regulation, and the FAA and the Department of Transportation were responsible for safety and maintenance of public facilities. In communications, the FCC does it all, and eliminating the agency would necessitate setting up another in its place.

That leaves two paths for deregulation: the Commission voluntarily sweeping away rules or Congress removing Commission jurisdiction. Congress has already given the Commission the tools to accomplish deregulation on its own, but the FCC is a quasi-legislative body, subject to constant lobbying by interest groups. To accomplish deregulation, the commissioners need to resist the powerful impulse to pick one of those interest groups to support and the equally powerful impulse to weigh the interests of various competitors in concession-filled 200-page orders.

Opposing regulation in general is not enough. More than anything, deregulation will require an administration that cares about telecommunications. Every president since Kennedy has spoken out against regulations, but efforts to eliminate regulation across the government have been unsuccessful.[169] It is essential to have a president who cares about deregulating the industry, so that parties that benefit from regulations do not find a sympathetic ear at the White House. Nixon torpedoed deregulation when the Teamsters objected, not because he lacked political courage, but because he was focused on other issues. Ford was focused on deregulating transportation, and he was not diverted by objections from politically-powerful groups, as evidenced by his comment that, "if the Teamsters and truckers are against it, it must be a pretty good bill."

Why did Ford and Carter focus on deregulating transportation? The easy answer was that they had to, because the railroads were failing and the airlines were about to crash. In contrast, industry hardship has not been enough to force the current administration to focus on telecommunications, but to be fair, the industry never was in as dire a shape as transportation was in the 1970s, with nationalization a real possibility.

Part of the reason Ford and Carter focused on transportation was

169. Justice Breyer has noted that the deregulatory efforts that were successful in the 70s were focused on specific industries, and efforts to reform regulations across government have generally failed. Breyer, *supra* note 22, at 5; *see also* BREYER, *supra* note 5, at 341.

that the academic community was uniform in its recommendations. Carter's chief economic advisor, Charles Schultze, explained that one of the reasons Carter favored deregulation was uniformity of expert opinion. "If you polled 500 economists you'd get 499 to say you ought to do it."[170] At the Kennedy hearings, Professor Merton Peck was surprised to find that the administration witnesses were citing economic literature in support of deregulation. "Looking at their footnotes, I discovered an amazing fact. People do read economists' writings, and those writings are reflected in the testimony of the previous witnesses."[171] Moreover, Professor Roger Noll testified that economists were almost universal in their support for deregulation:

> The nice thing about being a student of industrial organization and regulation is that you can get along with your colleagues, because you never have to run the risk of being dead wrong and saying regulation has been foolish in a particular sector. I know of no major industrial scholarly work by an economist or political scientist or lawyer in the past 10 years that reaches the conclusion that a particular industry would operate less efficiently and less equitably than with regulation. The conclusion is unanimous.[172]

Such uniform recommendations found ready listeners in Ford and Carter. Ford was probably the most economically-conservative president since Coolidge, believing in smaller government to his core. Carter came to deregulation through his fights for better government. He saw that regulation of transportation was a mess, and he set out to fix the problem.

Ford and Carter were both naturally drawn to deregulation, but there is another reason they made deregulation a priority: because they could. The late 1970s were a time when big political donors had less influence than any time before or since. Prior to the 1970s, there were no independent commissions to enforce campaign financing laws, and those laws were more honored in the breach than in the observance. The 1970s were a time of revolutionary reform of campaign finance laws, when 49 states and the federal government passed laws making contributions public, banning large cash contributions, and creating enforcement agencies. Over time, loopholes in the new laws were exploited, PACs grew, and the stain of Watergate faded, allowing well-connected companies and unions to again exert influence over the political process.

Today, money talks again, and it will be difficult to overcome the

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170. Interview by James Sterling Young, *supra* note 150.

171. *Airline Charter Fares: Hearings before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 93rd Cong. 68 (1975) (statement of Merton Peck).

172. *Id.* at 76 (statement of Roger G. Noll), *cited in* DERTHICK & QUIRK, *supra* note 7.

special interests that benefit from the remaining economic communications regulations. Because vested interests are strong, Congress is unlikely to do more than it already has to deregulate the industry. It is more likely that Congress will bow to the interests of Internet giants and impose economic regulation on Internet traffic. If it does, the regulations will probably last 30 to 50 years. Trucking regulations may have made sense when they were imposed during the Depression (although in retrospect they were a bad idea even then), but they made no sense after the war, and they lasted for 60 years. Regulating the railroads made sense at the end of the 19^{th} century, but the regulations remained unchanged for 87 years. Today—120 years later, when mention of "the economic power of the railroads" elicits laughter or bewilderment—railroads remain subject to more regulation than their trucking and airline competitors.

Federal regulations of telecommunications have been around for almost a century, and they are unlikely to be eliminated, or even simplified, in the current environment. Regulatory capture is alive and well in Washington, as demonstrated by the concessions the FCC allowed competitive carriers to elicit during the AT&T–BellSouth merger proceeding. Individual regulators may differ in the competitors they support, such as rural carriers, Bell Operating Companies or Competitive Local Exchange Carriers, but they almost all confuse advancing the interests of companies with advancing the national interest.

Decades of incremental decisions that balance the interests of competitors have created a nonsensical jumble of telecommunications regulations which arbitrarily apply to some services and not to others. The system can no longer be fixed though added complexity. The answer is simplicity, and simplicity means eliminating regulations. For that to happen, the country needs a leader who cares about the industry and who is willing to suffer criticism from companies who benefit from the current regulatory scheme. Let's hope one comes along soon.