

## OFFICE OF THE PRESIDENT

## The Council of Graduate Schools in the United States



One Dupont Circle, N.W.  
Washington, D.C. 20036

Phone: (202) 223-3791

12/23/81

The speech of Ms. Estelle  
Fishbein at CGS' Annual  
Meeting - Wash., D.C. - 12/3/81  
per Telephone request  
for Dr. Boyer.

Edna Khalil  
Admin. Asst.

THE REVOLUTION AGAINST REGULATION  
FROM RHETORIC TO REFORM

The subject of regulatory excess has inspired almost as much rhetoric as the topics of inflation and taxes. Every candidate for elective office announces himself in favor of a reduction in unnecessary federal regulation. Every elected official claims to be giving priority attention to the public's need for relief from the paperwork burden created by a vast bureaucracy which gives the impression of being in a perpetual make-work frenzy.

One need not have a long memory to recall that the reduction of federal regulations was an avowed goal of President Carter, although his efforts to that end were minimal and generally ineffective. Indeed, addressing the problem of pregnant Federal Registers proved not to be much of a priority of the Carter administration which celebrated its last day in office by printing three volumes of the Federal Register containing a monumental eleven hundred pages.

President Reagan took office amidst a ground swell of protest against both the sheer number of federal regulations governing the lives of every citizen and every business, and against the trivia to which so many regulations address themselves. There has proven to be a vast reservoir of public resentment against the Orwellian intrusion of Washington bureaucracy into every aspect of one's business and personal life. This administration entered office

seemingly dedicated and well prepared to take on the task of deregulation. Transition teams, study groups, and task forces have produced reams of blueprints to deregulation, and independent reports from organizations such as the National Association of College and University Attorneys and the American Council on Education have submitted detailed suggestions to the Vice President's Task Force on Regulatory Reform.

But enough energy has been expended on mere polemics about the excesses and burdens of federal regulations. Surely it is very tempting for the education establishment to engage in angry denunciation about the effects of federal regulations on colleges and universities. The anger is the result of a steady accretion of insults to the integrity and independence of academic institutions, of a forced waste of our scarce financial resources, of a critical diversion of our energies, and of an illegitimate reordering of our priorities according to capricious demands capriciously timed.

But I am here today to tell you that while higher education must continue to press its case for deregulation vigorously, even courageously, it is equally important that it press for a responsible reform of regulation and law.

"Responsibility" is the key word here. Academicians should not demean themselves by demanding the repeal of regulations simply because they are an inconvenience. All laws and all regulations are somewhat inconvenient to live with and they are just as inconvenient to other segments of society as

they are for colleges and universities. But many of the laws, and the regulations which flesh them out, are responses to ills and abuses in our society that could no longer and should no longer be ignored. They are attempts to correct inequities and to avert injuries, and they have served the purpose of directing our attention to the existence of serious problems.

It is our responsibility to make the point loud and clear that our universities and colleges have no quarrel with the goals of many of the laws and regulations, and that it is the process and direction of regulation, rather than the goals to be achieved, which is the focus of criticism.

Academe's quarrels with government regulation can be divided into two general areas of criticism.

The first is that the bureaucratic establishment long has been wedded to the view that higher education should be appropriately treated just like any other industry, so that government agencies have been reluctant to refine their rules and procedures to fit the characteristics of educational institutions. Thus in the early 1970's I was witness to a remark by the assistant solicitor of Labor charged with responsibility of enforcing the Equal Pay Act, that the Department would consider faculty as interchangeable as bus drivers. And to this day that Department's personnel still lack an awareness that a comparison between faculty members is a somewhat complex undertaking differing greatly from a comparison of bus drivers or welders or typists. The Department of Labor and the various agencies charged with enforcement of the civil

rights laws continue to attempt to apply quantifiable criteria to judge the qualitative decisions involved in faculty hiring, promotion and pay.

The second criticism is that government laws and regulations often intrude deeply into areas that are better left to the discretion and judgment of academic authorities, and that this is often to the detriment of the persons whom the regulations were intended to benefit.

The Buckley Amendment, for example, has virtually destroyed the integrity of written recommendations and their value to admissions officers. . . all to the detriment of worthy students. Moreover, the statute and regulations tie the hands of a dean when in his judgment as an educator a student's interests would best be served by making his parents aware of academic or behavioral problems.

The regulations prohibiting discrimination on the basis of handicap -- absent anything in the 45 word statute supporting this interpretation -- preclude pre-admission inquiries regarding handicap although our institutions bear a legal responsibility for accommodating all handicaps. Moreover, since drug addicts and alcoholics are to be considered handicapped for purposes of the law and regulations, the admissions officers of medical and dental and nursing schools are precluded from asking for information which is absolutely vital to a valid evaluation of a student's fitness to enter the health professions.

Those same handicap regulations impose an obligation on colleges and universities to modify academic requirements for a degree for handicapped students and require universities

to demonstrate to the government's satisfaction the essentiality of a degree requirement.

These are only a few examples where existing regulations depart from principles of sound educational administration, where existing regulations intrude into decisional areas where government has no legitimate place, and where the bureaucratic imagination has had a major triumph over common sense.

The problem of survival of free academic institutions in a highly regulated society has been my professional and personal preoccupation for many years. While each component of a University administration may experience a confrontation with a particular set of regulations, the office of the college or university attorney becomes the focal point for contact between the institution and the full panoply of government regulations. We have the opportunity to see the whole picture, and the picture has -- for many years -- been a most grim and depressing one as government has narrowed the area of discretion and judgment. We have witnessed a steady erosion of the right to academic self-governance, the ability to determine for ourselves institutional priorities and, most importantly, the right to be different.

Most of the senior government agency personnel with whom I have had contact over the years -- regardless of administration -- have been strongly of the opinion that a university is simply another industrial organization like GM, GE, and Bethlehem Steel, and if government intervention into the day to day affairs and decisions of businessmen is to be the order of the day, then there is no reason why academic institutions should be treated any more tenderly.

It is discouraging to admit that this argument has come from the mouths of many scholars as well.

However, I believe that there is a valid argument to be made both for the exercise of restraint in extending the activities of government regulators to our campuses and for the use of different mechanisms of regulation. Here I should note that the lower level field agency personnel who actually visit our campuses bring with them distinct attitudes of hostility to the academic way of life, suspicion and distrust. Make no mistake, the main difficulties we have in dealing with them stem from their bias and their conviction that our institutions are hot beds of illegal discrimination . . . even before an investigation begins. The typical letter ending a review in which a university has been found to be in compliance contains no words of congratulation but only a warning that "we'll be back",

There is a most essential distinction between the corporate organization calling itself a university, and the counterpart organization within the business and industrial complex. That distinction lies in the fact that universities have a special relationship to the First Amendment not commonly shared by commercial industrial enterprises. For the university, much like the press, is a custodian of the most fragile of our civil liberties, namely freedom of speech and thought. Viewed in that light, universities are this nation's most precious resource, a repository of our intellectual heritage and a source of future intellectual growth and development. Manufacturers and retail establishments may be regulated and constricted, yet the business of production and buying and selling can still go on. But if

regulation of the university inhibits the search for the most excellent minds, if it inhibits inquiry and criticism, if it suppresses the free exercise of intellectual judgment and the responsible exercise of discretion, then the business of the university is concluded.

While there is indeed a need for deregulation, there is an accompanying necessity for the higher education community to be prepared to seize the initiative and to devise and suggest alternatives to the present approach to regulation which will be more effective, more efficient, yet compatible with academic self-governance.

Too often when proposed regulations are published the period for public comment passes with few educators communicating their concerns to the government agency or making any efforts at persuasion. How many of you communicate your concerns on proposed regulations? How many of you let your congressional delegation know that certain proposed regulations taking shape under the hands of a secure and insulated bureaucracy are unwise and even detrimental to the educational mission? How many of you are willing to urge your president to permit your institution's name to be added to an amicus brief when some sister school is challenging a bureaucratic excess?

It is a serious mistake to believe that our Washington associations can do the job alone. We must all individually share the responsibility of shaping public policy towards higher education.



There is no question but that so far as academic administrators are concerned, the regulations and enforcement activities of the agencies concerned with monitoring equal opportunity or affirmative action have been particularly vexatious. Here again the point must be made that colleges and universities are not seeking a retreat from the goals of equal opportunity -- but we are urgently in need of a reform in the methods of measuring compliance.

The methods presently prescribed by the regulations defy logic and are based on false assumptions. They have not served the ends of equal opportunity. They do not create jobs. They focus on paper rather than on people. They are interminable and inconclusive. They divert vast sums of money from real institutional needs to meet the costs of collection of computer printouts bearing statistical calculations of questionable validity which serve no institutional need.

In the area of equal opportunity it is not that colleges and universities need fewer regulations. It is that a wholly different mechanism is needed to ensure compliance because the present regulations -- when applied to measure compliance by the employment pattern of academic personnel -- are unreliable and an essentially costly but worthless exercise.

In some ways the Government already has acknowledged the validity of tailoring enforcement mechanisms to suit the character of the industry subject to review. Accordingly, separate rules have been designed to accommodate the unique characteristics of the construction industry. Why is higher education any less deserving?

I suggest that a new mode of enforcement of the Executive Order be developed which would build upon the extensive tradition of peer review in colleges and universities. This mechanism could mandate the formation of an equal opportunity council within each college and university which would have responsibility for the continuing review and monitoring of hiring, firing, promotion and other practices of the institution. Because such a council would be composed of persons with knowledge of university operations, they would be familiar with academic practices and the concepts of tenure, the operations of the academic career ladder, the relative importance of faculty duties and responsibilities, and the role of faculty in university operations. This would avoid one of the most troublesome problems associated with current OFCCP enforcement, namely, the unfamiliarity of OFCCP personnel with the organization and operation of academic institutions, and their attempt to force such institutions into the industrial mode.

There is compelling precedent for the assignment to university peer review bodies of the primary and major responsibility for enforcement of a government program. An outstandingly successful example is the self-regulation which occurs in the use of human volunteers for research funded in whole or in part by a grant or contract from the Department of Health and Human Services. HHS' policy requires that each recipient of a contract or grant establish an institutional review board (commonly referred to as an "IRB") which is the primary mechanism for assuring that the rights of human subjects are protected by

investigators within the institution. The pertinent regulations (45 CFR Part 46) set forth the required membership of IRBs, define their authority and responsibility, and set forth their recordkeeping responsibilities. Such institutional review boards have proven to be an efficient, effective and unintrusive way for HHS to carry out its statutory responsibilities, and minimize the need for a vast enforcement machinery within the Department itself. Most importantly, the IRBs have proved to be responsible mechanisms for the protection of human subjects. My University has had in excess of fifteen years experience with peer review of research involving human subjects. The members of the IRBs operating within the University have demonstrated their diligence and responsibility in maintaining adherence to high ethical standards of research. Moreover, their review activities have been readily accepted by the academic community which has long been accustomed to peer review.

Equal employment opportunity requires similar adherence to ethical standards of conduct on the part of supervisors and decision makers. I can see no reason why "institutional review boards" set up to monitor university performance in the area of equal employment opportunity cannot be equally effective and, indeed, even more effective than the present cumbersome mechanisms which rely almost exclusively on an outside government bureaucracy. The membership of such EEO councils would be better equipped to detect both pretextual conduct and to develop meaningful monitoring devices tailored to the organizational structure of the institution. Many, if not most, institutions already have affirmative action officers and affirmative action committees. This would be a way to build

on members' knowledge of EEO laws and their prior experience, while giving them a more meaningful role in institutional management.

To put it plainly, the enforcement of the Executive Order 11246 is too big for the Government to do the job alone. There are 3,270 institutions of higher education listed in the Education Directory published by the National Center for Education Statistics for the year 1980-1981. Given the amount of time which it takes OFCCP to complete even one compliance review (OFCCP's current compliance review of my University is into its third year!), it is obvious that only a vast bureaucracy could review all institutions on any reasonable periodic basis. A program of self-regulation by colleges and universities of adherence to the statutory and ethical standards of equal employment opportunity appears to be the only reasonable alternative. At the very least the concept deserves serious consideration and even experimentation.

To sum up, ladies and gentlemen, worthwhile reform cannot be achieved overnight. Despite the policies of the President and his Cabinet, it takes a long time for it all to trickle down to the bureaucracies that are the government. It can only be achieved by a relentless effort, by a continued willingness to speak out, by a constant attention to what the policymakers in government, elected and appointed, are doing. Academicians must be prepared not only to criticize but to offer constructive suggestions as well. This is merely consistent with education's mission . . . to find ways to do things better.

Most importantly, we should not be inhibited in confronting those who would strip our academic institutions of every attribute of independence. I do not think that we should surrender our argument that the needs and interests of academic institutions are as distinctive as their mission in a free society. There should be no shame in professing that we are a special interest group.

(As an aside, I would predict that in the 80s academia's attention is going to shift from the need to preserve academic independence from government to the need to preserve traditional academic values from the dictates and persuasions of industry.)

I fully expect that the fight for reform of government methods and policy towards higher education will be accompanied by some heat. We will undoubtedly lose some of the battles for reform, but we may win some too. In any event we can always be grateful that, as Will Rogers once put it, "we're not gettin' all the government we're payin' for".