PERSPECTIVES

CAFE's Recipe for "Light Trucks"

A survey of the nearest parking lot or traffic jam confirms that, compared to ten or fifteen years ago, Americans are driving a different array of vehicles these days. Vehicles known as light trucks—pickup trucks, vans and minivans, and sport-utility vehicles—now make up almost half of all passenger vehicle sales. Large sedans are less common now and station wagons are an endangered species. In this transformation, some now see environmental and safety problems. It seems that light trucks use more gas than cars and that cars do not fare well in collisions with light trucks. So-called consumer groups are suggesting that the government mandate higher fuel-economy, so as to downsize light trucks. It is an ironic suggestion, because the popularity of light trucks is in large part a result of the fuel-economy standard. In 1978, the corporate average fuel economy standard (CAFE) set out to raise the mileage of cars. That was accomplished by dramatically lowering the average weight of cars. It turns out that the American people and the auto industry were not going to be passive in the face of that regulatory distortion. And therein lies the tale of the light truck.

FROM LIGHTER CARS TO LIGHT TRUCKS

CAFE sets an average miles-per-gallon minimum for firms selling passenger vehicles in the U.S. There are different standards for the two classes of vehicles, cars and light trucks, and the standards are applied separately to two sources of vehicles, domestically produced and imported. That is, a company that sells both domestic and imported vehicles must meet the standard for both fleets separately. Cars are, well, cars. A light truck is defined by CAFE as any four-wheel vehicle that is not a car and that weighs less than eighty-five hundred pounds. The distinction between cars and light trucks seems to be somewhat arbitrary, but the category of light trucks includes most vans, minivans, pickup trucks, and sport-utility vehicles.

The standard for cars is much more restrictive than the standard for light trucks. Since 1978, the first year of CAFE, the standard for cars has increased from 18.0 to 27.5 mpg—an increase of 52.8 percent. The standard for light trucks has increased from 17.5 to 20.6 mpg—an increase of 17.7 percent.

In their 1989 study, Robert Crandall of the Brookings Institution and John Graham of Harvard estimated that CAFE lowered the average weight of new cars by approximately five hundred pounds, with consequent effects on safety. Their finding is easily confirmed. Car weights were quite stable for at least twenty years before 1978. Weights declined substantially in 1978 and 1979, and then stabilized at a much lower level. The average weight of new cars before 1978 was 3,610 pounds, the average weight since 1980 is 2,921 pounds. And while car weights stabilized after their CAFE-induced decline, the average weight of light trucks has increased by more than five hundred pounds.

The effects of CAFE can be seen not only in the weight, but also in the sales of light trucks. Before 1978, the share of passenger-vehicle sales attributable to light trucks had been rising slowly, taking twenty-five years to grow from 13 percent to 23 percent. After 1978, the growth rate tripled, so that by 1995 the light-truck share had surpassed 40 percent. Some of the increased demand for light trucks can certainly be attributed to the advent of a new type of light truck, the minivan. (The other types of light trucks all existed prior to CAFE.) The development, refinement, and popularity of new types of light trucks, however, can be seen as a response to the CAFE regulation.

CONSUMERS CHOOSE

As real gas prices declined through the 1980s, consumers began seeking pre-CAFE-sized vehicles. But CAFE made pre-CAFE-sized cars scarce. In the long run, CAFE did not induce consumers to substitute small cars for large cars, but to substitute light trucks for large cars. With the switch to light trucks, the overall average vehicle weight is now approaching the pre-CAFE level. In sum, consumers and producers have been doing their best to avoid the adverse safety consequences of CAFE.

Then why did CAFE originate and why does it persist? Given CAFE's arcane structure and tenuous connection to gasoline consumption, a high level of ignorance must be assigned to (even) the public sector in order to argue that CAFE is intended to conserve resources. Convoluted policies do not suggest ignorance so much as a vested interest with a determined motive. From that perspective, it is more accurate to view CAFE as a subsidy to domestic compact car production, disguised as a conservation policy.

As noted, the standard treats a company's imports and its domestic production as separate fleets. Thus, the domestic producers could not comply with CAFE by selling, under their own brand names, fuel-efficient imported cars. Imports of Japanese cars surged in the 1970s, and the low profits on domestically produced small cars were leading domestic producers to displace them with captive imports. To avoid paying CAFE fines, however, the domestic producers had to continue producing small cars in the U.S., to the benefit of domestic workers. Indeed, CAFE may have induced the domestic producers to maintain entire model lines that they would otherwise have stopped producing.

Whatever the motivation of CAFE's sponsors, those in

Washington may see the switch to light trucks as a safety problem. It is actually an attempt by consumers to overcome the safety problems of the original, misguided regulation. Instead of raising the standard for light trucks, CAFE should be repealed. In any case, CAFE's distortion of the passenger vehicle market appears to be part of a systematic political calculation, a calculation that values human life at a discount.

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EPA: THE ENEMY IS US

The National Environmental Policy Act (NEPA) is unique among federal environmental laws. Enacted in 1969, NEPA does not establish permissible pollution levels or emission targets, nor does it proscribe environmentally damaging activities. Indeed, NEPA has no explicit substantive requirements. Rather, NEPA seeks to advance environmental protection by establishing a set of uniform procedures for all federal agencies to follow—all, that is, except for the Environmental Protection Agency.

Just as NEPA is special among environmental laws, the EPA is special when it comes to NEPA's enforcement. Due to a series of court decisions (and narrowly targeted legislation), the EPA is largely exempt from NEPA's procedural requirements. Those rulings and enactments presume that an agency with "environmental" as the first word in its name can be trusted to undertake the "functional equivalent" of the NEPA process when taking actions that may have a significant environmental impact. No other agency—environmental or otherwise—has such an exemption from NEPA.

Current experience with environmental law suggests that the "functional equivalent" doctrine is unwise. Simply put, the EPA cannot be trusted to consider the environmental ramifications of its actions; indeed, the EPA often ignores the unintended environmental consequences of its policies. Many EPA policies compromise public health and environmental protection by ignoring potentially destructive side-effects.

PURPOSES OF NEPA

Congress enacted NEPA "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." NEPA achieves those goals primarily by requiring the integration of environmental considerations into the agencies' decisionmaking process.

Under NEPA, "all agencies of the Federal government" must implement specific procedures to ensure that agencies adequately consider the environmental implications of policy decisions. In particular, agencies are required to draft Environmental Impact Statements (EIS) for all "major federal actions significantly affecting the quality of the human environment." NEPA forces agencies to consider environmental issues and present the environmental impacts of their activities to the public. In that sense, the NEPA process is similar to recent regulatory reform proposals that would require regulatory agencies to consider the impacts of their rules and present their findings in the *Federal Register*.

Since the earliest NEPA litigation, courts have recognized that "these provisions are not highly flexible." If an agency fails to follow NEPA and drafts an inadequate EIS, federal courts will stop it in its tracks. The existence of other statutory requirements does not obviate NEPA's requirements unless there is a direct conflict. Agencies cannot abdicate responsibility to consider environmental impacts merely because there is a preexisting federal standard addressing a particular environmental concern.

"FUNCTIONAL EQUIVALENCY" AT EPA

Beginning in the early 1970s, federal courts ruled that the EPA could bypass NEPA's requirements when compliance with other environmental laws is deemed to provide the "functional equivalent" of the NEPA process. Initially that exception was fairly narrow. In *Portland Cement Association v. Ruckleshaus* 1973, for example, the "decisive" issue for the D.C. Circuit Court of Appeals was that the EPA actually performed steps under section 111 of the Clean Air Act that were designed to achieve the same ends as the NEPA process, including the consideration of alternative measures and public participation. The court sought to "strike a workable balance between some of the advantages and disadvantages of full application of NEPA." Nonetheless, the court made clear that it did not intend to make "any broader claim of NEPA exemption" for the EPA.

Other courts showed less restraint. The Sixth Circuit found it inconceivable that "an agency whose sole purpose is the improvement of the environment" would have to file an EIS. The Tenth Circuit found that "to compel the filing of impact statements could only serve to frustrate the accomplishment of [NEPA's] objectives." As it expanded, an additional justification for the doctrine developed: "specific statutes prevail over general statutes dealing with the same basic subjects," therefore environmental laws focused on a subset of environmental concerns would trump NEPA, even if there was no explicit conflict. Compliance with Congress' environmental mandates, the Courts concluded, was the "functional equivalent" of the NEPA process.

To date, the "functional equivalency" doctrine has expanded to cover virtually every major environmental law administered by the EPA. Federal courts have exempted the EPA from NEPA compliance under the Clean Air Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Ocean Dumping Act, the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Toxic Substances Control Act. Additional legislative enactments exempt the EPA from NEPA compliance for the Clean Air Act and portions of the Clean Water Act. The only major environmental

law where the "functional equivalence" rule has not been applied is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, aka "Superfund").

No other agency has been granted "functional equivalency" exception to NEPA, even those agencies that are responsible, to some degree, for environmental protection. Federal courts have considered, and rejected, extending the "functional equivalency" doctrine to the National Marine Fisheries Service, and the U. S. Forest Service, among others. The EPA alone gets special treatment.

"FUNCTIONAL EQUIVALENCY" VS. ENVIRONMENTAL PROTECTION

At least one court recognized that exempting the EPA from NEPA's requirements could compromise environmental protection. In 1972, a federal District Court in Colorado challenged the "functional equivalency" doctrine.

The case, *Anaconda v. Ruckleshaus*, concerned a proposed federal implementation plan for Deer Lodge County, Montana, under the Clean Air Act of 1970. Anaconda operated a copper smelter in Montana that was the primary source of sulfur dioxide emissions in the area. The EPA proposed placing severe emission controls on the facility and held an informational hearing on the proposed rule. Anaconda demanded an adjudicative hearing and, when its request was denied, sought a preliminary injunction alleging, inter alia, that the EPA failed to undertake an environmental impact statement on the rule.

The argument put forward by the District court was rather simple. It can be reduced to the following syllogism, "Major premise: All federal agencies must file a NEPA statement. Minor premise: EPA is a federal agency. Conclusion: EPA must file a NEPA statement." The court reasoned that "if Congress had wanted to exempt EPA from the requirements of [NEPA] . . . it would have done so." The court noted that in other instances, Congress did in fact explicitly exempt the EPA from NEPA's procedural requirements for certain programs. The Court made a powerful case, but was nonetheless overruled on appeal.

While the District Court's arguments centered on statutory construction, the facts of the Anaconda case demonstrate the potential environmental consequences of exempting EPA actions from NEPA. In the *Anaconda* case, the court was concerned that "Compliance with the Administrator's proposed emission limitation would create additional pollution problems including . . . water pollution, solid waste disposal . . . and air pollution problems having to do with the quarrying, transportation and the hauling of limestone and other similar materials." In other words, the EPA's regulation could well do more environmental harm than good.

THE EPA'S ENVIRONMENTAL DAMAGE

Creating a broad exemption for a federal agency creates the opportunity for environmental impacts to escape consideration in the agency decisionmaking process. Given the structure of the EPA, and the nature of the statutes that it implements, that danger is expected. There are separate statutes and programs focusing on each major pollution medium, and it is understandable why an EPA official focused on reducing air emissions might neglect the impact air quality rules may have in other areas. That sort of "tunnel vision" often afflicts federal agencies when there is not some mechanism, such as that found in NEPA and some regulatory reform proposals, that forces officials to consider the forest along with the trees.

Regrettably, perverse—even antienvironmental—consequences of environmental regulation are increasingly common. Superfund remediation requirements sometimes increase risks to surrounding communities. Extensive permitting requirements, by creating obstacles to the opening of new facilities, slow down the replacement of older, less-efficient, more-polluting technologies with their newer, cleaner counterparts. Regulations that seek to eliminate minute health risks often create greater threats to public health by depressing economic activity. Premature deaths and the incidence of disease correlate with socioeconomic status. Indeed, while EPA Administrator Carol Browner opined that new, tighter air quality standards would help protect asthmatic children, evidence suggests that the economic impact of the EPA's rules will result in more asthma cases and hospitalizations than the air pollution the regulations are supposed to prevent. In a world in which all government actions can have unintended environmental impacts, NEPA exemptions are an invitation for environmental harm.

Defenders of judicial and legislative NEPA exemptions for the EPA may suggest that requiring the EPA to follow NEPA's procedures will inevitably interfere with NEPA's purpose of enhancing environmental protection. One federal court raised the concern that "An impact statement requirement presents the danger that opponents of environmental protection would use the issue of compliance . . . as a tactic of litigation and delay." While NEPA can be used for obstructionist purposes by any group, irrespective of its economic or ideological interest, that argument implies that NEPA inherently represents a significant barrier to the implementation of important federal policies.

Yet if NEPA compliance would prevent the EPA from protecting public health, then it presumably obstructs the ability of other federal agencies to fulfill their respective obligations. There is no doubt that NEPA compliance often comes at significant cost, and can delay the issuance of federal permits, even for private projects. However, NEPA has not shut down a single federal agency, let alone ended all road construction, timber cutting, wetland development or habitat modification. Nor would it eliminate the EPA's ability to promulgate environmental regulations. Moreover, routine activities, such as the issuance of Clean Air Act permits, could still bypass the NEPA process if the programs under which they are issued were designed in accordance with NEPA's mandates.

There is no question that the EPA would resist compliance with NEPA, just as other federal agencies sought to escape from NEPA's mandates when first they were first implement-

ed in the 1970s. Yet resistance to the full consideration of environmental impacts is no reason not to apply the same rules to the EPA that every other agency must follow. NEPA endeavored to set a consistent framework for environmental decisionmaking for the entire federal government. There is no reason to leave the EPA out of the process.

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ABA: ARROGANCE AND SANCTIMONY

Interest follows principal is an elementary principle of common law. "Not so," insists the American Bar Association; "under our program, Interest on Lawyers Trust Accounts (IOLTA), the interest on short-term deposits of nominal sums belongs to us and we may use it as we see fit."

Often in legal cases or other transactions, individuals must deposit money with attorneys. Often, those deposits originate with real estate transactions as earnest money deposits or as closing costs to be held for a day or two before settlement. Others constitute settlement proceeds or refundable retainers; that is, advance payment for court and litigation expenses. Traditionally, lawyers have held those funds separately, returning them to the client on demand. IOLTA never casts doubt on the ultimate return of the principal. It directs simply that the deposits be pooled and that the interest earned be channeled to the state bar association for "charitable" purposes. Individual deposits, it claims, would be too small to earn interest net of accounting fees.

For nearly twenty years, in state courts, U.S. district courts, and the federal circuit courts of appeal, opponents have protested an unconstitutional "taking" of property that infringed as well on the First Amendment. Thus far the ABA has been the winner: administrative orders and court contests have sanctioned IOLTA.

ORIGINS OF IOLTA

In 1993, the Court of Appeals for the First Circuit upheld the program; but in September 1996, the Fifth Circuit reversed a district court decision by holding that IOLTA did indeed constitute an unconstitutional "taking" of the client's property. The reversal and the disagreement between the circuit courts triggered an appeal to the U.S. Supreme Court which accepted *Phillips v. Washington Legal Foundation* for review during its winter term, thus setting off a legal firestorm.

IOLTA began innocuously in Florida in 1978 when the Florida Bar Association instituted a requirement that attorneys pool certain client deposits, specifically those that were nominal" or "short-term," in special "trust accounts," in order to divert the interest income to the funding of civil legal services for the poor. Several fruitless legal challenges followed. One of the challenges might eventually have succeeded since the accounts created were essentially demand-deposit accounts on which federal banking law forbade the payment of interest. In 1980, however, Congress authorized the establishment of Negotiable Order of Withdrawal (NOW) accounts which, for the first time, permitted banks to pay interest on demand deposits.

IOLTA blossomed. It is now operational in every state except Indiana, and is mandatory or "comprehensive" in nearly thirty. The "nominal" or "short-term" deposits—terms never precisely defined by the bar—can generate interest of about $100 million per year, down from $150 million or more when interest rates were higher.

How are those millions used? The bar claims that they fund civil legal services for Americans of low income. In practice, IOLTA works hand in glove with the federal government's Legal Services Corporation (LSC) to fund activities curtailed by recent federal restrictions and cuts in the budget. Between 1983 and 1993, according to an LSC survey, IOLTA contributed $405.8 million to its programs. In addition to subsidizing pro bono activities, IOLTA supports indirectly, through the LSC, a broad spectrum of left wing and statist political causes, ranging from aiding drug dealers faced with eviction to assisting a minority coalition in Boston to force the state legislature to redraw electoral districts.

BASIS FOR CHALLENGES

At no point in any of the multitudinous briefs defending the program has a petitioner raised the issue of the fiduciary attorney-client relationship and the responsibilities it supposedly entails. A fiduciary relationship is a sacred trust, obligating the attorney to place the client's interest above his own. It would seem to preclude expropriating and appropriating the client's interest for adventitious purposes, however noble those purposes may be.

Even more surprising in the briefs is the failure to insist on disclosure: never is it suggested that the attorney might have an ethical responsibility to tell the client how his money is spent. The attorney-client relationship thus becomes an involuntary contract whose terms are unknown to one party. It is, furthermore, nonnegotiable. Unless the client can find an attorney or a firm not participating in IOLTA—an increasingly difficult task as more and more states become mandatory—the client is unable to prevent the lawyer from placing nominal or short-term deposits in an IOLTA account. The client has, in effect, relinquished all control over his own funds.

Like most opponents of IOLTA, the Washington Legal Foundation (WLF), which has carried the standard in the First and Fifth Circuit and will argue the case before the Supreme Court, contends that taking private property—the interest—for public purposes—the projects funded by IOLTA—without compensation, violates the Fifth Amendment. WLF also points out that the right to exclude is part of the fundamental "bundle of rights" that constitutes property. IOLTA overlooks that right and, by forcing clients to support causes to which they might object, infringes on their prerogatives under the First Amendment which guarantees not only freedom of association but the right not to be compelled to associate.

IOLTA's defenders have generally made light of the exclu-

sion issue. The ABA insists that depositing funds with an attorney entails "voluntarily" relinquishing any right to control the use of the funds and "whatever constitutionally cognizable right they [the clients] may have had to exclude others." Since the client is unaware that he is "voluntarily" giving up his money, it is unclear how the relinquishment can be voluntary; but the ABA is beyond such legal niceties.

To answer the "takings" argument, the organized bar has resorted to language reminiscent of George Orwell. The taking of interest is not a taking, it has stated, because the mere fact that an IOLTA account generates interest "does not confer a property right in that interest on clients who are legally or practically incapable of earning interest directly." The bar has also stated that "legally or practically incapable" means that clients supposedly have no hope of a return, net of subaccounting fees, on such small sums. Yet enough has been "taken" to generate over $100 million annually, thanks in part to the banks, which accept IOLTA accounts and turn over the interest earned, not to their shareholders, but to the bar. Banks could in fact halt the program by refusing to accept the accounts.

As a result of the elaborate scaffolding, the bar gets something for nothing and can claim sanctimoniously that it is serving the poor. The Supreme Court now has a chance to end the charade and bring the scaffolding tumbling down.

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THE POLITICS OF PUBLIC LANDS

It has been more than a year since President Clinton signed a Proclamation declaring approximately 1.7 million acres of federal land in Utah a national monument under an ancient piece of legislation named the Antiquities Act of 1906. The original purpose of that Act was to protect archeological sites. The Act's principal proponent was a prominent archeologist and the primary lobbyists were archeological organizations, museums, and universities. The House Report on the bill discussed the need to protect "relics" and "ruins" scattered throughout public lands in the Southwest.

The title, language, and structure of the 1906 Act are consistent with the Act's purpose of protecting archeological sites. The Act has three short sections. Section One establishes a criminal penalty for theft or destruction at the sites. Section Two gives the President power to preserve such sites. Section Three grants permits for examination of ruins and excavation of archaeological sites.

ABUSING THE ACT

Unfortunately, Section Two of the Act has been abused by those unable to convince Congress to declare their favorite public lands as National Parks as often as it has been used by those wanting to save an ancient Indian habitat or other unique, confined site. Conservationalist Presidents found that they could torture the language of Section Two of the Act which empowers a President to reserve "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest—the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects protected."

Presidents, a the urging of environmentalist lobbies, have periodically cobbled together a list of prominent geographic features, wildlife habitats, and human artifacts on any given parcel of land, no matter how large. Then they labeled the list "objects of historic or scientific interest," and declared huge tracts of land to be "monuments;" all without Congressional approval. In so doing, the Antiquities Act became a vehicle for the creation of pseudonational parks, enjoyed for their scenic vistas, or for the creation of pseudowilderness areas, effecting land conservation or wildlife preservation. None of the supporters of the 1906 Antiquities Act anticipated such a use. Nothing in the legislative history of the act or its early history indicates that concerns over preserving scenery or land conservation would justify the creation of national monuments.

President Theodore Roosevelt was the first to misuse the Act. In 1908, he proclaimed 818,560 acres as the Grand Canyon National Monument. Other presidents followed. President Carter holds the current record for audacity. He withdrew fifty-six million acres of federal land in Alaska in 1978. Each time a President has issued a major proclamation under the Antiquities Act, he has done so as a way around a balky Congress. President Roosevelt declared the Grand Canyon to be a national monument after he had lost the power to create forest reserves in 1907. President Carter's Alaska proclamation came after Congress failed to adopt comprehensive Alaska lands legislation. And President Clinton's proclamation followed several failed attempts to designate Utah lands as wilderness areas.

Each major withdrawal of land under the Antiquities Act has generated substantial local anger. On several occasions, senators and congressmen, protesting the use of the Act on federal lands in their states, were able to exempt their states from further withdrawals. After President Franklin Roosevelt created the Jackson Hole National Monument, Congress passed a bill to abolish the monument. Needless to say, Roosevelt vetoed the bill.

Later, Congress passed an amendment to the Antiquities Act forbidding its further use on federal lands in Wyoming without Congressional consent. President Carter's Alaska proclamation was followed by a provision in the Alaska National Interest Lands Conservation Act that requires Congressional ratification for future Alaskan land withdrawals under the Act. President Clinton's new proclamation action has Utah's senators and Idaho's senators proposing similar "no more" legislation for federal lands in Utah and Idaho.

COURT ACTIONS

Presidential misuse of the Act had to pass muster in the Courts. In 1920, the Supreme Court held in *Cameron v. United*

States that the Antiquities Act did not restrict the President to the protection of archeological sites. In a single line, without reference to the Act's history or context, the Supreme Court declared the Grand Canyon National Monument to be an "object of unusual scientific interest," because it "has attracted wide attention among explorers and scientists, affords an unexampled field for geological study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors." None of the factors listed in that decision would have struck the 1906 Act's sponsors or drafters as relevant to a monument designation.

Federal district courts, shackled by the unprincipled 1920 decision, have upheld President Franklin Roosevelt's creation of the Jackson Hole National Monument and President Carter's Alaskan withdrawals, but not without reservation. In one of the several court challenges to President Carter's Alaska withdrawals, the district court judge in *Anaconda Copper v. Andrus* (1980) voiced considerable anger over the Supreme Court's failure to define any of the Act's limitations. Similarly, the district judge in *Wyoming v. Franke* (1945), hearing a challenge to President Franklin Roosevelt's creation of the Jackson Hole National Monument, recognized the "great hardship and substantial injustice" done to Wyoming; declared that the President had distorted the Antiquities Act; and encouraged Congress to "obviate the injustice." Apparently the district judge thought an plea to the Justices of the Supreme Court, to enforce the 1906 Act as written, was beyond hope.

Environmentalists who spoke in support of the Grand Staircase-Escalante National Monument were gleeful to the point of giddiness. When questioned about the process for its creation some dismissed such concerns as trifles. Others responded unabashedly for example, "Doubters will come to love the land so preserved and forgive how it was withdrawn. Look at the Grand Canyon, a national treasure. We view President Roosevelt's proclamation as visionary. That he had questionable authority speaks to his courage not his failures. President Clinton's proclamation will someday receive similar treatment."

The beauty of the areas encompassed by the national monument is breathtaking. But abusing the political system has costs. And like drops into a bucket, each new act of raw political power breeds additional increments of disrespect among our citizens. Environmentalists speak often of a legacy for their grandchildren but their view of that legacy is narrow. Our primary task is to leave our grandchildren a stable political and economic system. Only with such a heritage can they enjoy our national parks (and quasiparks). Glee over the abuse of an Act of Congress shows a cancerous disrespect for the processes of government.

Evidence of the effect of an "end justifies the means" approach to land conservation is not hard to find. The bitterness of Utah citizens toward the federal government will not dissipate quickly. Indeed, the bitterness is evident. For example, as a direct result of the Clinton proclamation, county commissioners—local elected officials—in three Utah counties ordered the bulldozing of roadways through wilderness study areas. It was a blatant trespass on federal land. The County Commissioners' argument? Rights-of-way established under an obscure statute from the Civil War era justify their actions. Torturing the language of old statutes is a game all can play.

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MEDICARE LIMITS SENIOR LIBERTY

Imagine that you are diagnosed with severe depression at age sixty. You seek out the best-known psychiatrist who prescribes Prozac and long-term counseling. After time, the medical treatment and counseling appear to be working and you are quite satisfied with your psychiatrist, whom you have come to trust. For the next five years, you continue to see your psychiatrist and pay privately for your outpatient mental health services.

Unfortunately, you turn sixty-five on 1 January 1998. Effective that date, you can no longer pay privately for the psychiatrist, medical doctors, and other health care practitioners of your choice unless your doctor promises to stop seeing all Medicare patients for two years. This new Medicare regulation was included in the recently passed Balanced Budget Act of 1997 and signed into law by President Clinton on 5 August 1997.

How can the federal government enforce such a law? It is easy. The federal government automatically enrolls Americans into Medicare Part A (the part that pays for hospital care) the minute they apply to collect their Social Security payments at age sixty-five. They have no choice about the matter. For many Americans, that means they automatically become subject to Medicare rules and regulations whether they actually want to participate or not. In addition, the federal government enrolls seniors into Medicare Part B (the part that pays for doctor visits) unless they actively decline. Some Americans decline to join part B because it does not cover most self-administrable prescription drugs, such as Prozac. Medicare part B has been considered voluntary, at least until now.

Once the new Medicare law takes place in 1998, seniors will effectively be coerced into joining Medicare Part B. The reason is that most doctors are not going to drop all of their Medicare patients in order to treat a few private-paying ones. "Currently, only 9 percent of doctors do not participate in Medicare and few doctors can afford to give up their Medicare practice for the sake of those patients who wish to contract privately," says Paul Beckner, president of Citizens for a Sound Economy. That means seniors will have to join Medicare Part B if they want to see the doctor of their choice. "Ultimately, the two year exclusion makes it nearly impossible for most seniors to contract privately," stresses Beckner.

Senator Jon Kyl (R-Ariz.) wanted to include explicit language in the Balanced Budget Act that preserved the right of seniors to contract privately with the doctor of their choice. However, the two year exclusion provision was added by

Representative Bill Thomas (R-Calif.) who stressed that President Clinton threatened to veto the entire Balanced Budget bill without the addition.

It is ironic that President Clinton threatened to veto the entire budget bill over a provision that would have given Americans greater health freedom. After all, just two years ago, he wrote the following to the Coalition for Patient Rights:

> I do not advocate prohibiting an individual from purchasing outpatient mental health services directly from a practitioner, even if those services are also provided by the individual's health plan. Neither the Health Security Act nor my current health care proposals are meant to curtail this prerogative. I support the right of patients to receive these services without being compelled to disclose clinical records to health plans or to the government. Further, I endorse the right of practitioners to provide outpatient mental health services directly to individuals without penalty.

Like Clinton's statement about the era of big government being over—made as he expands regulations and spending—his statement about health care choice rings hollow.

Now that the budget threats are over, Congress has the opportunity to debate a stand-alone bill that would return to seniors their freedom to contract privately with the doctor of their choice. Senator Kyl introduced the Medicare Beneficiary Freedom to Contract Act of 1997 (S.1194) on 18 September 1997. The bill permits physicians and other practitioners to enter into private contracts with Medicare patients without being banned from the Medicare program for two years. Congressman Bill Archer introduced a similar bill in the house (H.R. 2497).

Not only does private contracting improve seniors' choice of doctors, but it also reduces fraud and abuse. The American Association of Retired Persons reports that 93 percent of polled respondents believe that fraud is widespread in the Medicare program. Some critics disagree with AARP's solution to the fraud problem, which is to prohibit private contracting, thereby keeping seniors locked in a system burdened with fraud and abuse. Karl Humiston, a Harvard-trained psychiatrist and member of AARP stresses that, "When Medicare was created in 1965, President Lyndon Johnson promised that nothing in the Medicare law would prevent seniors from exercising their freedom to choose their health care. But thirty years later, Medicare is preventing seniors from spending their own money on the doctors and health care of their choice. Is that not Medicare fraud and abuse?"

Do not be surprised if President Clinton threatens another veto on The Medicare Beneficiary Freedom to Contract Act in the name of preventing Medicare fraud and abuse. However, Americans must realize that the real Medicare fraud and abuse will take effect 1 January 1998 unless corrective legislation is passed to allow private contracting.

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