Perspectives

on current developments

The Coal Leasing Scandals

It is strange what raises a scandal in Washington, and what does not. Take the issue of federal coal leasing. For ten years, from 1971 to 1981, the Interior Department got hardly any money from selling new coal leases, a coalition of environmentalists, eastern coal mining interests, and state and local governments having succeeded in imposing a moratorium on almost all new leasing. No one seemed to care very much. Finally, in 1981, leasing resumed—and, almost at once, an enormous *cause célèbre* broke out over the department's alleged failure to get enough money out of the lease sales. The difference is that the ten-year moratorium was a mere policy issue, while the revenue shortfall was that delicious thing, a potential scandal. In due time a select panel (the "Linowes commission") was appointed to investigate charges of wrongdoing in federal coal leasing. Now the commission has issued its final report—uncovering less of scandal, but perhaps more of policy interest, than might have been expected.

At first glance, the task of coal leasing looks easy: why not just auction off the rights to leases? This would work well if there were strong bidding competition for federal coal leases. The problem is that competition is usually weak. Historically, 70 percent of the tracts leased by the government have received only one bid. About half of all federal coal lies under surface lands that are owned or leased by state governments or private parties. Moreover, much federal coal is intermingled with private coal, about one-sixth of the former being located in areas with a checkerboard ownership pattern, a legacy of the nineteenth-century railroad land grants. The owners of the surface rights, or of the nearby nonfederal deposits, may enjoy a major bidding advantage.

Current law forbids the Interior Department to negotiate directly with private parties on lease sales. Thus the department has little choice but to set a price more or less unilaterally. And that involves two symmetric dangers: the price may be too low, giving the bidder an undeserved windfall, and the price may be too high, preventing the sale from taking place. In either case the government will forgo some revenues.

Unfortunately, estimating the "fair market value" of each tract is an utterly subjective matter. It is seldom possible to derive an accurate figure simply by observing the sale price of coal deposits in nearby private markets, although the department tries to do this to some extent. The alternative is to construct an economic model of the factors that influence the value of deposits. Yet estimates of that sort are quite sensitive to such variables as coal prices and mining costs, and there is ample room for disagreement on future projections of these variables.

In 1979 the Carter administration announced that it was ending the long moratorium on federal coal leasing, with sales to resume in January 1981. It had pacified the Western states where mining would take place by offering them more say in leasing decisions. The showcase of the Carter plan was a lease sale in the Powder River Basin of Wyoming and Montana, which took place on April 28, 1982.

The Powder River sale, however, proved to be the program's downfall. Within a few weeks it was reported in the trade press that someone had leaked Interior's appraisal data to some coal companies a month and a half before the sale. In addition, critics accused top Interior officials of arbitrarily cutting the minimum acceptable bids for some coal tracts to half the appraised level. The upshot, critics said, was that industry had obtained the tracts on the cheap. Congress ordered two investigations of the irregularities, one by the staff of the House Appropriations Committee and the other by the General Accounting Office.

Once the House and GAO investigators got going, they broadened the scope of their inquiries beyond the two original charges to include the question of whether the appraisals had been done properly in the first place. (These calculations, which had been made by Interior career field appraisers, had not previously come under question.) Each investigating team then produced its own estimates of fair market value using different appraisal assumptions and methods. The House staff report, which appeared in late April 1983, charged that, according to its preferred assumptions, the fair market value of the Powder River coal tracts was $60 million more than the department had sold them for. The GAO report, issued the next month, echoed many of the same criticisms and estimated the shortfall below fair market value at $100 million.

Massive publicity ensued. The House voted to put a moratorium on federal coal leasing for a few months, but the Senate refused to go along. The critics, however, did succeed in a proposal that a special commission be created to review the department's conduct of the leasing program.

The Commission on Fair Market Value Policy for Federal Coal Leasing was duly chartered on August 4, 1983, and was given six months to submit its final report, a mere eyeblink by the normal standards of these Washington commissions. At the request of House advocates of the commission inquiry, David Linowes, professor of political economy at the University of Illinois, was made chairman. Linowes selected four other members to serve on the panel. Considering the obscurity in which coal leasing policy had languished for so many years, the commissioners were a surprisingly eminent lot, including a former Federal Reserve Board member and a former Internal Revenue Service commissioner. Only one of the five, however, had much experience in coal issues, and none hailed from the West (where almost all federal coal is located). Four of the five were Democrats.

The commission's work was barely underway when a new controversy erupted over a September 1983 sale of leases in the Fort Union region of Montana and North Dakota. Congress reacted by imposing a moratorium to last until ninety days after it had received the commission's final report.

The panel came under very strong pressures to denounce Interior's management of the leasing efforts, and not just from environmentalists. Many advocates of coal leasing, for their part, wanted to distance the leasing program from the unpopular secretary of the Interior, James Watt. Watt made matters worse with his now-famous description of the commission's demographic make-up ("a black, a woman, two Jews and a cripple"). The resulting brouhaha also ensured that the coal commission came under intensive press coverage thereafter.

At first, however, the commission shied away from specific criticism of the Interior Department's conduct. Its draft recommendations, released in November, mostly offered broadly worded suggestions on how to improve the system in the future. Press accounts suggested that the commission was trying to exonerate Watt and his minions. Stung by these criticisms, the commission ordered its staff to launch a probe into the Powder River sale and two coal swaps that had led to separate controversies.

When the final report of the commission was issued February 17, 1984, it still consisted, in overwhelming bulk, of an examination of the policy problems involved in running a leasing program. But it also included a few passages that were much more critical of Interior, and these bits of the report received almost all the public attention. Concerning the Powder River lease sale, the report said that "at the very least, the Interior Department made serious errors in judgment in its procedures" and "failed to provide a sound rationale for many of its actions."

The findings were by no means a full vindication of Interior's critics. It turned out that there had been some mechanical errors in the House staff's calculations of fair market value which, when corrected, reduced the reported shortfall from $60 million to only $10 million. GAO's report fared somewhat better. The commission agreed with GAO on two of the three cases in which it had criticized Interior's technical adjustments in the appraisal models. Although it drew no conclusion on the third, Interior and GAO agreed to have an independent study by the Oak Ridge National Laboratories to settle the matter, and a recent draft of that study concludes that Interior was correct on the issue. This third adjustment, which

In Brief–

The Lawyers' Draft. A California appeals court has come up with a creative way to save money on legal services for the poor: order lawyers to do the work for free. A unanimous three-judge state panel ruled on December 30 that a convicted murderer is entitled to a court-appointed lawyer to defend him against a civil suit charging him with "wrongful death." The unlucky lawyer chosen could wind up shelling out an estimated $20,000 to $25,000 in expert witness and deposition fees without reimbursement.

Judge Harry Low wrote that although some argue "that to compel an attorney to serve without compensation is to impose involuntary servitude on him or her, or to deprive him or her of property without due process of law . . . ," the attorney's "professional responsibilities represent a modest consideration for the valuable license entrusted to him or her."

Judge Donald B. King took a different view. "To paraphrase Abraham Lincoln, a lawyer has nothing to sell but his time," he wrote in a separate opinion; "courts cannot order other professional or business persons to donate their time, their services or their product, let alone their money. Why is a lawyer different?" Nonetheless, King concurred with the ruling.

Actually, California lawyers long ago gave up any principled opposition to involuntary representation: what upsets them about the new ruling is that their servitude will be costly as well as unpaid. (Earlier unpaid cases have involved such things as paternity suits, which are relatively cheap to defend.) They also worry that the courts may begin drafting lawyers to represent indigent *plaintiffs* as well as defendants.

Carcinogens of the Month. One by one, the "renewable-energy" favorites of the 1970s are turning out to be hazardous to human health. Wood burning, for example, made a major comeback during the energy crisis, with sales of stoves rising from 50,000 a year in the 1960s to 2 million a year in 1975. But now wood stoves, along with fireplaces, are considered a major pollution problem in many northern states. Beaver Creek, Colorado, has flatly banned wood stoves. In Missoula, Montana, government "smoke readers" can fine homeowners $100 if they decide the smoke from their chimneys is too thick.

"All we really know," according to Elaine Bild of the Missoula County environmental office, "is that the size and shape of wood smoke particulates are similar to those of asbestos, and that some of the chemicals in wood smoke are cancer-causing, such as benzopyrene. There are others." The state of Oregon is battling the killer hearths with clean-burning standards for wood stoves. A Vermont manufacturer estimates that new laws of this type will add about $250 to the price of a stove.

Meanwhile, even that most perfect of energy sources, conservation, turns out to pose its own health hazard. Well-insulated homes trap inordinate amounts of radon, a natural radioactive gas that can seep into homes through basements. The average person gets many times more radiation from radon in houses than from nuclear power plants. And this, just when you thought it was safe to run indoors and hide. . . .

AFL-CIO Spokesman Endorses Newspaper Regulation. Senator Robert Packwood (Republican, Oregon) has argued for scrapping the Fairness Doctrine, on the grounds that the broadcast media should enjoy the same freedom as the print media. At a recent hearing before Packwood's committee, a spokesman for the AFL-CIO surprised the senator by declaring that the treatment of the two media should indeed be brought into line —not by deregulating broadcasters but by regulating newspapers.

"I do not think," said AFL-CIO special counsel Laurence Gold, "that the First Amendment says that if you are running a newspaper, the government cannot say that you will devote at fair cost a certain portion of your newspaper to printing contrasting views." He added that "access rules, unless they really do impose unacceptable costs—and we do not believe they do—enhance free speech rather than limit it."

Gold criticized the Supreme Court's decision in *Miami Herald* v. *Tornillo*, in which the Court struck down a Florida law that forced newspapers to offer a right of reply. He charged that there is a "bias at work [in the media against unions], and it is one that runs throughout the society." Why? "People who own the media are employers. They do not forget that status, by and large, in presenting labor disputes." Gold pointed out that union leaders have been in the forefront of (unsuccessful) demands for legal access to newspaper space in the past.

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amounted to at least $35 million, made up the single largest part of the $100 million shortfall that GAO found.

The Linowes commission devotes literally hundreds of pages of its report to discussing how hard it is to determine the fair market value of federal coal leases. Which raises the question: why did the commission proceed to redo the Powder River appraisals, merely substituting its own calculations for those of Interior, the House, and GAO?

Admittedly, the report does not claim the spurious precision for its estimates that its predecessors did. Acknowledging that the uncertainties are too great to allow an exact estimate, the commission merely offered a range of possible fair market values for the Powder River tracts calculated under a range of as-

sumptions. In some cases, the results are very close to Interior's original calculations. Yet it was willing to venture the assessment that "the Interior Department probably did not receive fair market value."

The appraisal models that Interior used for Powder River had been developed by the department's field appraisers in Casper, Wyoming, and the commission found no evidence that Watt or other political appointees had interfered in their use or development in any way. Yet it was these models that yielded the shortfalls calculated by GAO and the House staff—the entire shortfall in the GAO case and part of it in the House case. Thus, whether or not the shortfalls were overstated, they resulted in whole or part from the independent actions of career employees—which made the scandal, if there was one, rather less juicy than the critics appeared to think.

The department committed at least two serious errors. First, it failed to launch an immediate investigation and to consider postponing the sale once it discovered the leak of appraisal data. Second, its changes in bidding procedures encouraged industry to believe, rightly or wrongly, that it would disregard its field appraisals and accept lower bids. (In actuality, one of the bids was rejected even though it was above the minimum level.) The changes in bidding procedures were based on valid economic concepts, the commission said. But they were adopted at the last minute, and were poorly implemented, although planning for the sale had been going on for three years.

In the end, matters did not turn out so badly: the commission found that industry did not bid on some of the tracts on which minimum bids had been reduced, and one key tract had been mistakenly overvalued in the first place. On balance, it turned out that, in total, Interior received more than its field appraisers believed the leased tracts were worth, if more by accident than by design.

Given the inherent problems, the Linowes commission did not find much fault with the present design of the leasing program. (The department had corrected the most serious defects after the Powder River sale.) The commission did make thirty-six recommendations, however, thirty for administrative correction and the rest for congressional action. Among the former, it urged that the boundaries of lease tracts be drawn more carefully. Up to now Interior has often tailored leases to meet the needs of specific coal companies that own surface rights or adjacent tracts, which makes that company more likely to bid but lowers the chance that there will be a competing bid. As possible answers to the intermingling problem, the commission recommended negotiating with nonfederal owners of nearby tracts to offer the tracts jointly as a single bidding unit, and expanding private and federal coal exchanges.

The commission also recommended a new sale procedure called "inter-tract bidding," under which the government would offer more tracts than it intended to lease, and then lease only a selected few with the highest bids per ton of coal. Companies would have to compete against bidders for several or more tracts at a time. The coal industry thus far has opposed this innovation, fearing that companies might be forced to pay higher prices (which is just the point).

Even with the best efforts, bidding competition for many tracts is likely to be weak. The commission thus suggested beefing up the program's professional staff, mainly by adding geologists and appraisers, and in general keeping the appraisal procedure professionally credible and free from any hint of favoritism or political interference.

The Interior Department says it plans to adopt twenty-nine of the thirty recommendations for administrative action, most by the end of this year. The more significant recommendations are probably those that require congressional action. They include relying on negotiation rather than competitive bidding for some lease sales, and loosening the "diligence" requirement that requires companies to forfeit leases unless they begin using them within ten years (see Robert Nelson, "Undue Diligence: The Mine-It-or-Lose-It Rule for Federal Coal," *Regulation*, January/February 1983).

On what is undoubtedly the most important issue—whether federal coal should be leased at all—the Linowes commission recommended leasing 3 to 4 billion tons of coal over the next two years, which is much less than Secretary Watt wanted to lease, but much more than had been leased in any two years since the moratorium began in 1971. The political pressures of the last fifteen years, however, continue unabated: although the moratorium on leasing

expired in May, Interior Secretary William Clark says he will keep it in place at least through 1984, which means past the election.

The Linowes commission report resembled nothing so much as an exercise in educational theatre. The commission was presented with a script for which a surprisingly wide audience was clamoring, including both critics and supporters of the federal leasing program. It played its role as assigned: nearly everyone's views are represented at one place or another in the 639-page report, which may explain why almost all sides have greeted the report favorably, from the Sierra Club to the National Coal Association. It also, however, managed to slip into its script a lot of edifying long-run information about the policy details of federal coal leasing—information that Congress should consider carefully if it reconsiders the statutory framework of federal coal leasing next session.

Regulation and the 1985 Budget

To judge by its 1985 budget proposals, the Reagan administration cannot think of anything it would like to do, or stop doing, in the field of federal regulation. There are virtually no major or even minor initiatives—no programs will be greatly expanded, nor any greatly shrunk. The drama in the new budget, such as it is, consists in what has not happened: the substantial cuts that had been planned for fiscal 1983 and 1984 did not materialize, and the administration is giving up, for 1985 at least, the attempt to make those cuts.

The figures below are adapted from the annual roundup of regulatory agency budgets published by the Center for the Study of American Business at Washington University in St. Louis. They show that the budgets (in real terms) and staffing levels of federal regulators have seen very little change, overall, since fiscal 1982, President Reagan's first full year in office, a year in which they were cut significantly. (From 1980 to 1982, real budgets and staffing levels at the agencies fell by about 9 and 12 percent respectively.)

There are some variations within the figures. The biggest proposed increase is in the area of environment and energy, led by a big boost in spending for the regulatory activities of the Environmental Protection Agency, from $1,329 million in 1983 to $1,458 million in 1984 and $1,687 million in 1985. The Office of Surface Mining in the Interior Department, which regulates strip mining, is going from $163 million to $251 million in the same period. Both these agencies had taken more than their share of cuts in earlier Reagan budgets. On the other hand, the Department of Energy's Economic Regulatory Administration continues to shrink as oil price regulation is wound down.

The resurgence of environmental regulation is all the more remarkable in view of the fact that last year it had been slated for another big cut—one that never came to pass. Whereas the 1984 budget had projected an 11.3 percent real drop in environment/energy spending from 1982 to 1984, the change is turning out to be an estimated gain of 0.4 percent. In general, 1984 regulatory spending is coming in more than 8 percent higher than was projected in last year's budget, with a 1.2 percent real increase instead of a 7 percent drop.

EXPENDITURES ON FIFTY-SEVEN REGULATORY AGENCIES
Selected Fiscal Years, 1970–85

Area	1970	1980	1982	1983	1984 (est.)	1985 (est.)
	EXPENDITURES ($ billions)					
Social Regulation						
Consumer Safety & Health	$ 0.3	2.3	2.4	2.5	2.6	2.6
Job Safety & Other Working Conditions	$ 0.1	0.7	0.8	0.8	0.8	0.9
Energy & the Environment	$ 0.1	1.9	2.0	2.1	2.2	2.5
	$ 0.5	4.9	5.2	5.4	5.7	5.9
Economic Regulation						
Finance & Banking	$ 0.1	0.3	0.4	0.4	0.4	0.5
Other Industry-Specific	$ 0.1	0.4	0.4	0.3	0.4	0.3
General Business	$ 0.1	0.3	0.3	0.4	0.4	0.5
	$ 0.3	1.0	1.1	1.1	1.2	1.2
TOTAL	$ 0.8	5.9	6.3	6.5	6.9	7.2
TOTAL IN 1970 DOLLARS*	$ 0.8	3.0	2.7	2.7	2.8	2.7
PERMANENT FULL-TIME POSITIONS (thousands)						
Social Regulation	9.7	66.4	57.6	55.3	55.4	55.9
Economic Regulation	18.0	24.1	22.2	21.6	21.6	21.6
TOTAL	27.7	90.5	79.7	76.9	77.0	77.5

* Adjusted by GNP deflator (actual and, for later years, estimated in budget).
Source: Adapted from figures of the Center for the Study of American Business.

CHANGE IN EMPLOYMENT FOR TWENTY-EIGHT REGULATORY AGENCIES

Agency	Permanent Full-Time Positions 1983	1984 (est.)	1985 (est.)	Percent Increase (Decrease) 1983–85
Consumer Product Safety Commission	577	558	557	(3.5)
Food & Drug Administration	7,188	7,187	7,090	(1.4)
Antitrust Division	742	704	669	(9.8)
National Highway Traffic Safety Administration	500	495	494	(1.2)
Bureau of Alcohol, Tobacco & Firearms	2,950	3,022	2,879	(2.4)
TOTAL, *Consumer Safety & Health*	11,957	11,966	11,689	(2.2)
Mine Safety & Health Administration	3,408	3,271	3,115	(8.6)
Occupational Safety & Health Administration	2,354	2,355	2,332	(0.9)
Equal Employment Opportunity Commission	3,127	3,127	3,127	—
National Labor Relations Board	3,213	3,000	3,000	(6.6)
TOTAL, *Job Safety & Other Working Conditions*	12,102	11,753	11,574	(4.4)
Economic Regulatory Administration	537	417	321	(40.2)
Office of Surface Mining	724	757	763	5.4
Environmental Protection Agency	9,223	9,622	10,675	15.7
Nuclear Regulatory Commission	3,203	3,349	3,353	4.7
TOTAL, *Energy and the Environment*	13,687	14,145	15,112	10.4
Comptroller of the Currency	2,917	2,810	2,785	(4.5)
Federal Deposit Insurance Corporation	3,554	3,554	3,554	—
Federal Home Loan Bank Board	1,402	1,385	1,349	(3.8)
National Credit Union Administration	599	532	532	(11.2)
TOTAL, *Finance and Banking*	8,472	8,281	8,220	(3.0)
Civil Aeronautics Board	434	395	344	(20.7)
Commodity Futures Trading Commission	550	557	567	3.1
Federal Communications Commission	1,896	1,975	1,953	3.0
Federal Energy Regulatory Commission	1,548	1,707	1,707	10.3
Federal Maritime Commission	290	252	251	(13.4)
Interstate Commerce Commission	1,201	1,063	931	(22.5)
TOTAL, *Industry-Specific Regulation*	5,919	5,949	5,753	(2.8)
International Trade Commission	399	438	482	20.8
Patent & Trademark Office	3,140	3,286	3,436	9.4
Federal Election Commission	214	231	231	7.9
Federal Trade Commission	1,122	1,141	1,144	2.0
Securities & Exchange Commission	2,021	2,021	2,042	1.0
TOTAL, *General Business*	6,896	7,117	7,335	6.4
TOTAL, TWENTY-EIGHT AGENCIES	59,033	59,211	59,683	1.1

Note: This table includes the International Trade Commission (omitted in prior years) and drops the Federal Railroad Administration.

Source: Adapted from selected figures of the Center for the Study of American Business.

Among the other agencies getting above-average spending hikes this year are three with fashionable "industrial-policy" and high-tech overtones, the International Trade Administration, the International Trade Commission (the first being a part of the Commerce Department, the second an independent agency), and the Patent and Trademark Office. The National Highway Traffic Safety Administration, which has come under attack for its deregulatory efforts, is getting an increase of around 5 percent in real terms for the second year in a row. Within the field of economic regulation, financial regulators continue to mark small increases—in view of the turmoil in these regulatory areas, it is perhaps surprising that they do not demand more. Industry-specific regulation continues to decline, but nearly all the shrinkage consists of sharp reductions at the Civil Aeronautics Board and the Interstate Commerce Commission. Other transport regulators remain on track—even that perennial reform target, the Federal Maritime Commission.

The figures for agency staffing show much the same trend as agency budgets: few areas except for environmental regulation will get big increases, but most agencies managed to stave off the moderate cuts that had been proposed last year. EPA is slated to add more than a thousand employees, bringing it back almost exactly to its staffing level of 1980.

The rest of the federal establishment is left very close to unchanged, in personnel terms, by the latest budget. Among the deeper cuts are 5 percent at the Antitrust Division of the Justice Department and at the Mine Safety and Health Administration. The ITC and Patent Office get increases of 10 and 5 percent respectively. Congress, of course, will revise

these figures, but probably not substantially. More ambitious changes, if any there are to be, will presumably wait for the 1986 budget, which will be submitted not too long after the inauguration of the President elected this November.

Pension Reversions: Who Owns the $100 Billion?

Most forms of government activism seem to be in remission at the moment. But not pension regulation. Reformers are crowding around pension funds like children around a Mexican piñata, trying to crack them open for the benefit of workers in declining industries (the 1980 "rescue" of multiemployer plans), transient workers (the "vesting discrimination" controversy and "women's pension equity" legislation), the proletariat in general ("social investing"), and so on. One possible reason why pension funds are so besieged is that it is not precisely clear who owns them: the money is no longer quite in the employer's hands, but is not yet in the retirees' either. The latest pension controversy, over reversions of surplus pension-fund assets, provides a good opportunity to consider the question of just who does own pension funds.

Since Congress passed the Employee Retirement Income Security Act (ERISA) in 1974, there has been an ironic turnabout. Back then many pension plans seemed on their way to going broke, and one of ERISA's main goals was to keep companies from underfunding their plans. Today, though there are still pockets of underfunding, the most hotly debated pension issue is how to handle widespread *over*funding—specifically, whether to let employers recover surplus assets from their overfunded plans.

Current law does not allow an employer simply to withdraw surplus assets from an ongoing pension plan. But there are two ways it can get the surplus, one fast and one slow. The fast way is to close down the plan. So long as it fully "vests" the benefits of all participants and provides for those benefits by buying annuity contracts from an insurance company, it generally is allowed to reclaim any residue that remains. The combination of a strong stock market and high interest rates (which lower the cost of buying the annuities) has left many plans with large potential surpluses, sometimes amounting to half or more of total assets, that could revert to the sponsor on termination. Overall, it is estimated that private pension plans have aggregate surplus assets of $100 to $150 billion, or from one-sixth to one-quarter of their total assets.

The slower way for a sponsor to gain the benefit of a surplus does not require closing down the plan; the sponsor may simply reduce its year-to-year contributions until the surplus is drawn down. If the surplus is very large in relation to liabilities, however, this method of recovery may require considerable patience—while the sponsor may feel a pressing current need for cash. And to add further fuel to the controversy, a few sponsors have deployed the recovered surplus for purposes, such as resisting takeover attempts, that have come under criticism for other (and perhaps legitimate) reasons.

Whatever the motivation, plans with substantial surpluses have been closing down in significant numbers. In the past four years or so, between January 1979 and February 1984, 242 plans with surpluses in excess of $1 million filed notices of intent to terminate. These plans covered about 300,000 workers, and their total surplus was about $2.2 billion—large numbers, but small fractions of the 29.4 million employees and $600 billion in assets in federally insured plans. Some of the companies that closed down plans, by the way, promptly opened almost identical new ones, although uncertainty on the legality of this practice has led a number of managements to replace ordinary pension plans with "defined-contribution" (profit sharing or employee stock ownership) plans.

The federal agencies responsible for these matters—the Department of Labor, the Pension Benefit Guaranty Corporation, and the Internal Revenue Service—have recently tried to clarify the existing law by issuing regulations and less formal guidelines. On April 4, 1984, the three agencies announced several measures to counter what they perceived as abuses. In particular, the rules were tightened to restrict "spinoff terminations," a practice in which companies chop their plans in two and then close down

the plan to which they have assigned the surplus. (Companies will now have to vest and cash-out the full benefits of employees in the ongoing plan, too.) Other new rules were designed to ensure that annuity benefits are cashed out at their full economic value, something that has always been obligatory but not always easy to enforce. At the same time, the agencies also made it clear that an employer can establish a new pension plan to replace the old one; banning such rollovers, in the agency's view, would simply give employers reason to close down pension plans without starting new ones.

These reforms have not ended the controversy. Senator Howard Metzenbaum (Democrat, Ohio) has denounced reversions as little short of "robbery" of pension plan beneficiaries. Metzenbaum has introduced legislation to require a portion of surplus assets to be distributed to employees in most cases and to impose a nine-month moratorium on terminations. Other reformers are considering alternative plans: conceivably Congress might attempt to distinguish between terminations motivated by the desire to get the surplus and terminations that occur for other reasons. In any case, the Reagan administration is resisting all the proposals that would make major changes in the legal status of reversions.

The reversion controversy raises in its strongest form the question of who owns a pension plan's assets. One side maintains that these assets properly belong to the employees, because when an employer contributes to a pension plan it is in effect paying deferred wages and cannot snatch them back later. At the very least, on this view, the employer ought to share any surplus with employees, presumably by buying them higher benefits than had been promised as of the date of termination. A ban on reversions, of course, would not force such benefit increases, especially since employers could still reduce their contributions; but reformers hope it might provide a push in the right direction.

The other side maintains that employers own the assets, because they have not, somehow, implicitly promised an investment windfall to workers; indeed they explicitly promised employees one thing only, a specified retirement income. The employer makes pension contributions by way of collateral, as a sort of good-faith commitment to show that the money will be there if it is ever needed. Once workers have claimed the pensions that the employer had promised them, their claim on the collateral is ended.

Proponents of the workers-own-pension-funds view sometimes cite a confusing aspect of current law, namely the requirement that pension assets be managed for the "exclusive benefit" of plan participants. What is ironic is that in a "defined benefit" plan (the most common type and the only one from which a reversion of surplus assets is possible), it is the employer rather than the participants that currently benefits or suffers when the plan's investments are managed at a profit or loss. Each participant's pension is set by a formula that is typically based on length of work service and pay at retirement. The amount that the employer contributes to the plan, on the other hand, fluctuates up and down based on investment and other actuarial experience. In other words, unless for some reason the employer is unable to make the necessary contributions, it does not matter to participants whether the plan is lucky or unlucky, whether its assets are managed well or poorly.

Even if a plan terminates, under present law, the participants (unlike the employer) typically have little down-side risk, except insofar as they had been hoping to accumulate benefits by adding more years on the job. If a plan does not have enough assets to pay off all promised benefits when it closes down, the Pension Benefit Guaranty Corporation steps in to make up the difference. (It, in turn, is entitled to recover its losses from the plan sponsor, up to a limit of 30 percent of the sponsor's net worth).

PBGC insurance does not guarantee all benefits—just almost all of them. (The most notable exceptions are pensions in excess of about $1,600 a month, benefit increases that have been in effect for fewer than five years at the time of termination, and pensions that were not vested at the time of termination.) It is estimated that 90 percent of all pension benefits are vested and that 95 percent of all vested benefits are covered by the PBGC. For employees of long service in the lower and middle pay ranges, the PBGC guarantees virtually 100 percent of accrued benefits. Of course, an employer

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Where's the Reform?

Walter Olson

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drawn: one need not take infinite political heat for a trivial reform. What disappoints many reformers is where the White House has drawn the line.

The second question, and perhaps the more interesting one, is whether the leaders are willing to *generate* the heat. And this brings us to a more substantive objection: that the administration has not brought its case to the public properly even when it has been bold about trying to deregulate. If an agency is not willing to take the lead in explaining the rationale for its proposals, it can at least get the word out to those who are most sympathetic, so that they can help make the case for it. Yet some agencies seem to think that if they only keep mum they can get regulatory reform without running into hostile comment—imagining, perhaps, that they can free us all without our noticing, or impose a cost-benefit regimen in secret. The attempt to avoid publicity usually fails dismally: the interests harmed by deregulation are typically quite aware of what is going on and quite good at generating publicity. Indeed, they can often get their way without it.

This is really the only pervasive criticism that I could level at OMB's regulatory review operation. When OMB has gotten into disputes with the agencies, the agencies have sometimes gone to sympathetic people in the press and leaked their side of the story, making OMB look, on the surface, pretty bad. In the instances I know about, however, OMB has refused to respond tit for tat; it has refused to take its side of the story to the press. Now, this is good for the administration in that it makes OMB a better team player, and prevents the emergence of an open schism within official ranks. What it is bad for is the substantive cause that OMB was fighting for in the first place. That is one reason why, although it is too early to reach any final judgment, the regulatory review process does not seem to have lived up to all the hopes we had for it when Reagan first issued Executive Order 12291.

The first head of OMB's review operation, Jim Miller, said that his office would win its battles for regulatory reform because "if you're the toughest kid on the block, most kids won't pick a fight with you." The danger now is that OMB will turn into the *nicest* kid on the block: the kid that has the best character in the world, is a credit to his parents—and gets beaten up by every other kid on the block. ■

Pension Reversions

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may not recover any surplus from a terminated plan until it has fully provided for all benefits, including those not insured by the PBGC.

Current law, then, does not rest on the principle that stock market gains belong to employees. Even the reformers do not carry that principle to its logical conclusion. If Congress passed a law against reversions, employers would still continue to profit from investment gains, since they could simply reduce their contributions to the plan. One might then ask: why not abolish this unfairness, too? When stock market rallies create a surplus, why not raise employee benefits automatically to restore the balance?

If the workers are to get all the pleasures of investment gains, however, symmetry suggests that they should also have to take the pains of investment losses. (The alternative is for market gains to ratchet pensions upward, and market losses to ratchet contributions upward, until random fluctuations carry both upward to infinity.) It is not entirely clear why abolishing defined-benefit pension plans and shifting all the risks of investment performance onto employees would leave employees better off. To date, of course, the reformers have not pressed their argument this far.

Anti-reversion legislation also has other economic consequences that have been neglected in the debate so far. If money used in overfunding may never be reclaimed, the effect in the long run might well be to make employers more careful not to overfund their plans, and more eager to press for amendments to ERISA to let them make direct use of their pension plans' assets. If so, pension promises might become less secure than they are now—surely an unintended outcome of a crusade to defend workers against "raids" and "robbery."