Perspectives on current developments

Enterprise Zones: The New Fluoride for Urban Decay

When politicians and experts of all persuasions look at the country's urban centers, they see the same grim facts. Cities have been losing industry and population, and the people who leave tend to be more skilled and affluent than those who remain. The result is high unemployment, a shrinking tax base, and a growing demand for social services.

Government's various programs for addressing the problem—job training, public employment, tax credits for hiring disadvantaged workers, urban renewal, and so on—have met with little success. A relatively new proposal, attributed to Sir Geoffrey Howe (now Britain's chancellor of the exchequer), takes a different approach. It seeks to revitalize the inner city by offering significant tax and regulatory relief to businesses that originate in, or move to, urban areas having high unemployment or widespread poverty. A trimmed down version of that proposal—the Urban Jobs and Enterprise Zone Act (H.R. 7240)—was introduced in the House on May 1, 1980, by Representative Jack Kemp (Republican, New York). It would offer tax incentives but not regulatory relief to qualifying businesses located in urban "enterprise zones."

In order to be designated an "enterprise zone" by the secretary of commerce, an area must have a population of 4,000 or more (except for Indian reservations), and must satisfy one of the following conditions: (1) an unemployment rate for the recent twenty-four months of at least twice the national average and 30 percent of the area's families living below the poverty level, (2) an unemployment rate for that period of at least three times the national average, or (3) at least 50 percent of resident families living below the poverty level. It must also agree to make a permanent reduction in property tax rates of at least 20 percent within four years. Enterprise zone status would last for a minimum of ten years but could be revoked if the locality failed to follow through on the property tax reduction.

For a business in an enterprise zone to qualify for the special tax incentives, at least 50 percent of its workers must do substantially all their work in the zone and 50 percent of such "qualified employees" (that is, 25 percent of the firm's work force) must reside in the zone.

The Kemp bill's list of incentives would produce major tax relief—estimated by the bill's proponents at approximately $1.4 billion—for firms that met the eligibility criteria:

- Tax rate reductions would provide the bulk of the relief. The social security tax rate for qualified employees and employers would be cut in half for adult workers and by 90 percent for those under twenty-one years old (estimated tax relief—$1.1 billion). Also, the tax rate that corporations pay on capital gains would be cut from 28 percent to 15 percent for three types of property: (1) office and factory equipment used primarily in the active conduct of a business located in the enterprise zone; (2) land and structures located in the zone and used in the conduct of a business or sold or exchanged by an individual whose principal residence is in the zone; and (3) a financial interest in a corporation, partnership, or other entity that was a "qualified business" in the most recent taxable year (estimated relief—$75 million). Finally, the corporate tax rate schedule, which now ranges from 17 percent on income below $25,000 to 46 percent on income over $100,000, would be lowered to a range for those income levels of 14 to 39 percent (estimated relief—$131 million).
- In addition, the bill would authorize certain accounting changes for qualified business, in order to reduce the complexity and cost of business accounting and to strengthen the financial position of new firms during their early years. A simplified form of accelerated

depreciation—three-year, straight-line—would be available for any property put in service in a zone, up to a maximum value of $500,000 (estimated relief— $53 million). Qualified businesses would also be allowed to carry net operating losses forward for ten years instead of only five, and businesses whose gross annual receipts have never exceeded $1.5 million would be given the option of using the cash basis for computing income (without any requirement to take inventories into account).

- The bill also provides that the Foreign Trade Zone Board should expedite applications from enterprise zones for "foreign trade zone" status, taking into account both their current and future economic development. Duty is not owed on goods that enter a foreign trade zone until they leave the zone, or on goods that are re-exported before leaving the zone. But, perhaps the greatest job stimulus from foreign trade zone status is the fact that no duty is owed on the value added to goods reprocessed within a zone, a provision that gives import companies a strong incentive to build job-creating assembly and reprocessing plants there.

At a theoretical level, the enterprise zones proposal must be viewed against the long-standing controversy over whether it is more efficient for the government to expand employment opportunities by moving people to jobs or jobs to people. Most government efforts to date have followed the former approach—giving people education, job training, or transportation to help them move up job ladders or across boundaries into long-term employment. The enterprise zones plan follows the other course, enticing existing or incipient enterprises to locate in areas of high unemployment.

Critics of the plan are skeptical that business tax breaks can reverse what appears to be an inexorable trend of jobs toward suburban, exurban, and rural settings. The flight of jobs and skilled workers from urban core areas, they claim, is a complex long-range trend, resulting from a confluence of factors including the changing composition of national output, improved transportation and communication facilities, the attractiveness of the lower wages or nonunionized labor available outside the cities, and the general unattractiveness of business conditions in the inner city. Proponents of H.R. 7240 seek to stimulate *new* business inside the zones rather than reverse past job flight and hope to make the tax relief substantial enough to do the job.

One must question the assumption that most of the businesses locating in the zones would be new ventures. To the extent that relocations became the main vehicle for job creation within the zones, the increased job opportunities thereby created inside the zones would have to be offset against the reduced job opportunities that would occur in the (often adjacent) areas from which the businesses had moved. In other words, to some extent, the scheme would simply shift unemployment across rather artificial borders. Indeed, there would be opportunities for a considerable amount of "gaming" as small businesses—whose low overhead made a move easy, or which were ready to relocate anyway—picked up and moved perhaps only a few blocks into the most convenient enterprise zone. In such cases the tax incentives, "financed" by the general taxpayer, will have done little to help the unemployment problem nationwide.

Furthermore, while it is true that small firms create more new jobs than large firms, they also fail more often. If it is primarily small firms that would utilize these tax advantages, their attrition rate must be taken into account in predicting the ultimate job impact of the enterprise zone package.

Perhaps the most questionable promise held forth by the proposal—implicit, if not expressed—is substantial reduction of minority unemployment. Renewed prosperity for the nation's cities tends to be equated with higher income for the cities' current inhabitants. The scheme might have that result. However, if in fact the new businesses simply brought with them new employees (or, more likely, old employees relocated from the suburbs), it would be the cities, not their present inhabitants, that would have been "saved." This might itself be a desirable goal, but it must not be confused with the goal of minority employment. Some movement of professional and skilled white workers back into the cities has already been noted in some sections of the country—aided, in cities such as Chicago and Washington, by mortgage loan subsidies and "homestead" laws that are viewed by some minority groups as efforts to squeeze them out of desirable inner-city locations. The enterprise zone proposal might be no more than another step in this di-

rection, moving the human component of the inner city to the near suburbs.

The central conservative appeal of the legislation is also subject to question—that is, the notion that it is not a program to pile inner-city residents into dead-end public jobs, but rather will "harness the energy" of the private sector. It can be argued, to the contrary, that at least those private jobs which would not exist without public subsidy are, in a real sense, public jobs. Subsidization of inefficient private businesses is simply the latest form of pork barrel—and perhaps the most dangerous, since, as in the case of Lockheed and Chrysler, it does not provoke unified opposition from those quarters generally opposed to government intervention. Perhaps the principal way in which employment by subsidized private firms differs from outright welfare is that the money probably goes to the less needy. Unless, of course, hiring conditions are imposed—an adjustment that would be likely to occur in the case of the enterprise zone proposal.

The proposal might have some merit as a demonstration project, especially if it included the easing of those regulatory and economic constraints on the free market whose substantial distorting effect is not generally appreciated—for example, environmental controls and the minimum wage. Such regulatory "easements" are part of the proposal being studied in Great Britain, but they were eliminated from the Kemp bill in order to make it less controversial and to keep it within the jurisdiction of a single House committee. Because of that compromise, the bill in its present form can demonstrate little more than the acknowledged truth that financially subsidized enterprises are more prosperous.

At base, H.R. 7240 is a familiar example of regulatory fine tuning—the use of new governmental incentives or constraints to offset the undesirable effects of governmental incentives or constraints already in place. Some of the policies responsible for the decline of the cities are not obscure or difficult to identify: mandatory busing, subsidization of mass transit and (through the highway program and gasoline price controls) even private automotive transit from the suburbs, and a tax structure and educational funding system that permits persons of moderate income to purchase quality education only through the purchase of real estate (that is, suburban housing that is higher priced largely because it comes with better public schools). The attempt to offset these influential policies with yet another regulatory program may be a new wrinkle—but in a very old and rumpled piece of cloth.

Academic Freedom Misapplied

Professor James Dinnan of the University of Georgia's College of Education is not a typical prison inmate. But then his offense is not typical either. Professor Dinnan began on the road to crime when he set as a member of a faculty peer-review committee that voted, six-to-three, against granting tenure to Assistant Professor Maija Blaubergs. Blaubergs sued the university, charging that she had been denied the right of free speech and free association and had been discriminated against because of her sex and national origin. When her lawyer demanded that six members of the committee disclose how they had voted, all but Dinnan cooperated. Dinnan based his refusal on the argument that, in accordance with university guidelines, the vote had been taken by secret ballot, and that secrecy in such decisions is necessary to protect faculty members against outside pressure.

Federal Judge Wilbur Owens ruled that Dinnan's refusal constituted contempt of court, and sentenced him to ninety days in prison and a $3,000 fine. The U.S. Court of Appeals for the Fifth Circuit denied his appeal—noting that the professor had "the keys to prison in his own pocket." Dinnan left his detention quarters at Elgin Air Force Base on October 3, reportedly ready to risk another longer sentence by remaining mute at his hearing in November.

Dinnan's case has received wide, and generally sympathetic, national press coverage as representing courageous defense of academic freedom. The courage is unquestionable, but the cause in which it is enlisted seems misdescribed and probably misperceived. There are some governmental impositions that are directed explicitly at freedom of intellectual inquiry, such as laws prohibiting the teaching of evolution (or, for that matter, the teaching of nonevolution). These may in every sense be said to be directed against academic freedom. It is something else, however, to describe in

that fashion laws of more general applicability (such as laws against fraud, or libel, or, to come to the point, employment discrimination) and the subsidiary imposition deemed necessary to enforce those laws (such as reporting and disclosure requirements). Such laws and impositions may be said to infringe academic freedom, in any meaningful sense, only if they are directed against some act or practice that is particularly necessary for academic inquiry. Otherwise, the cry of academic freedom amounts to no more than a claim for special exemption from measures that bear no less heavily upon the rest of society.

The object of Dinnan's protest seems to fall within the latter category, which makes the outpouring of editorial support difficult to understand. One cannot imagine equivalent sympathy for a lawyer, let us say, who declines in the course of an employment discrimination lawsuit to disclose the details of rejection of a female candidate for partnership; or for a doctor with respect to a female candidate for hospital residency; or for a corporate director with respect to a female candidate for an executive position. Yet the need of academics to make fearless and uncoerced decisions with respect to their colleagues is surely no greater than that of other professionals; nor are job and promotion qualifications in the academic fields any more ineffable and difficult to verify.

Thus, Dinnan is either defending a more general principle of academic association, or he is asking for special and functionally unjustified privileges for his own profession. Of course, the latter criticism can be met head-on, by simply asserting that universities are the most important of institutions and thus deserving of preferential treatment. Such a judgment would probably not be shared by that portion of the population (the majority) that does not belong to what might be called the intellectual class, and whose own social worth is not thereby aggrandized. And even intellectuals must admit that universities are hardly more necessary than the institution of government itself—which has been subjected to employment and promotion inquiries at least as rigorous. Nor is it persuasive to argue that university preferences are justified because there is a unique threat that government will seek to control educational institutions. That is again, for the intellectual class, a self-flattering assessment: the tyrant would probably place GM, AT&T, and CBS well above Harvard on his target list. It is, moreover, a curious argument in a society that has increasingly committed all of its education, from kindergarten through graduate school, to institutions owned and operated by the government, while generally refraining from government ownership of commercial enterprises.

Indeed, an argument can be made that if there is any institution which should not be exempt from governmental impositions generally made upon other private associations, it is academe—for in modern times, at least, that is the institution in which many of those impositions are first conceived and formulated. Nothing will so ensure care and concern in that process as the requirement that the conceivers and formulators drink from the same cup they have prepared for the rest of us.

In short, Dinnan's case seems too difficult to be resolved by a facile reference to academic freedom. Disclosure requirements associated with equal employment opportunity laws are not uniquely directed against academic thought; and there is no special reason for academic exemption. The real issue is the extent, if any, to which governmental pursuit of the desirable goals of these laws should be restrained (and thereby rendered less effective) by a concern for the confidentiality that is an important element of freedom of association, and therefore an important value for all free institutions. One suspects that the apparent consensus of editorial opinion that emerged in the Dinnan case on the assumption that only Mr. Chips was involved will rapidly dissolve when the issue is seen to include Howard Hughes as well.

Energy Independence Down the Tube?

Large-scale conversion to coal could probably reduce the free world's dependence on oil to the point where supply disruptions or OPEC price increases could not threaten serious consequences. For this reason, the free world leaders resolved at their June meeting in Venice to draw upon the huge coal reserves of the United States. A month earlier the *World Coal Study*

(drafted by experts from sixteen countries under the direction of MIT's Carroll L. Wilson) found that a tripling of U.S. coal production to 2.1 billion tons by the year 2000 is needed to prevent the radical restructuring of free world economies. The same study also provided the good news—that even allowing for the costs of the strict mining and air pollution controls that most Western countries have imposed, the recent rise in world oil prices has made extensive coal use and export economically feasible.

But returning to coal as a primary energy source will not be easy. While the regulatory constraints facing the industry may prove manageable, there remains another major obstacle —concern that U.S. transportation and port facilities cannot handle a large increase in traffic at reasonable rates. Potential coal users, electric utilities in particular, argue that high and rising rail rates—already allowed by the Interstate Commerce Commission under the 4-R Act of 1976 and now more readily available under the railroad deregulation enacted in October—impede their ability to convert to coal.

All of these concerns are focusing attention on the coal slurry pipeline, a competitive and, according to its supporters, highly efficient system for the transport of coal. The railroads, bitterly opposed, have blocked coal pipeline rights-of-way (1) by refusing to grant easements for the laying of pipelines beneath railroad property and (2) by lobbying successfully in Congress for six years against legislation that would confer eminent domain authority upon pipeline companies.

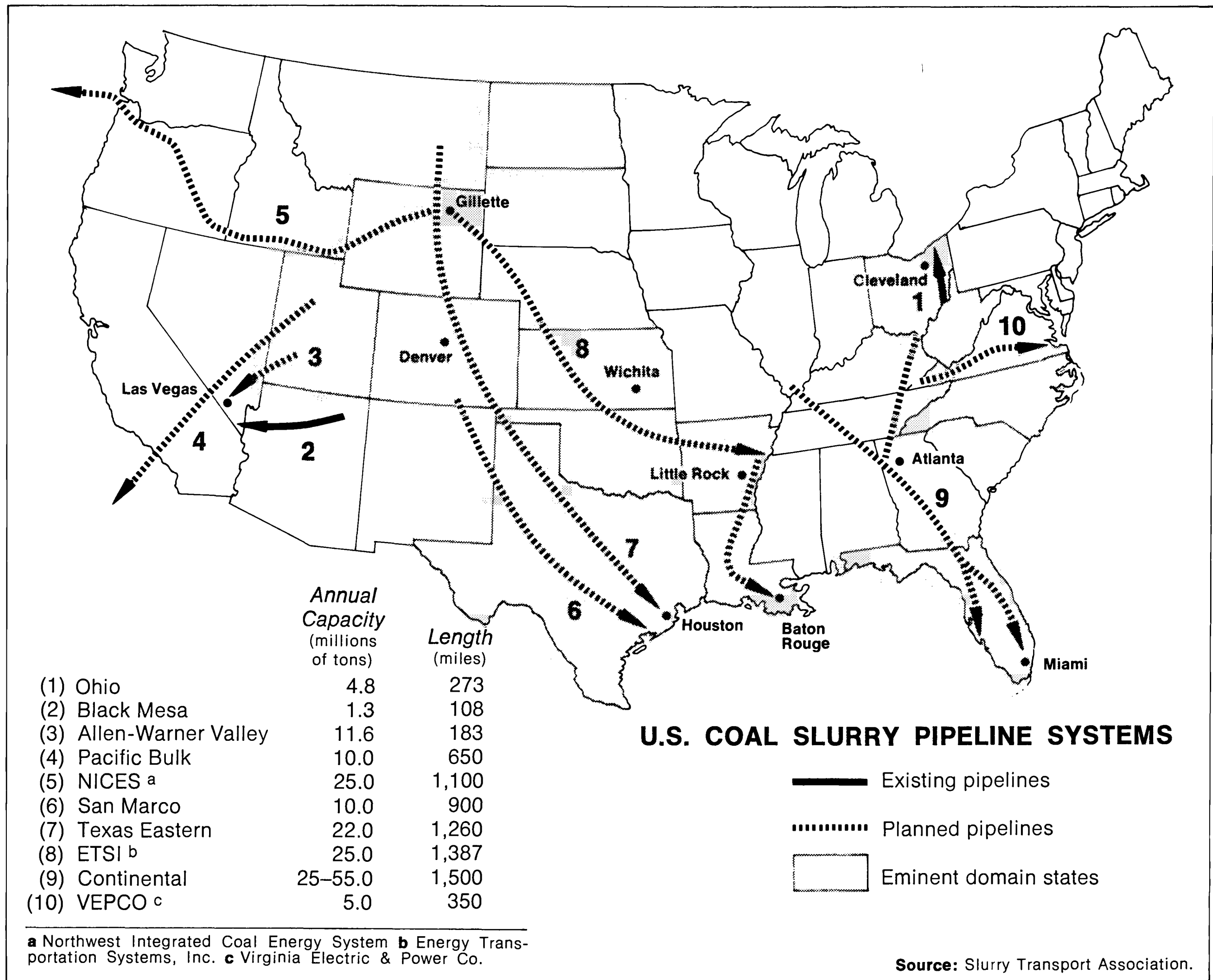
Coal pipeline technology is not complicated or new. Coal is simply ground into a powder, mixed with water, and pumped in slurry form through underground pipelines to its destination—a utility, major industrial plant, or port. There it is dried for burning as a primary fuel, or it could be pumped directly into a ship of special design. The first U.S. coal pipeline was built in Ohio in 1957, but was mothballed a few years later when the railroads in the area developed the unit-train approach and lowered their rates for moving coal. The second, and currently the only coal pipeline operating in the United States, is Black Mesa. Built in 1970 by a subsidiary of the Southern Pacific, it has been moving coal from northeastern Arizona to a power plant in southern Nevada for ten years with 99 percent reliability. Eight more coal pipelines are planned, but their development is made difficult or impossible by the rights-of-way problem.

The question is—should Congress grant eminent domain authority to pipeline ventures? The power of eminent domain is of course a sovereign prerogative, but may be conferred upon a designated third party to acquire property for a purpose that is in the public interest. In the past the granting of such authority has enabled the building of oil and gas pipelines, long-distance electric transmission lines, and of course the railroads themselves. At issue, then, is whether coal pipelines would serve the public interest.

Already in financial distress, the railroad industry sees rising demand for coal as the key to its revitalization. The railroads currently transport approximately 450 million tons of coal a year, almost two-thirds of the coal burned in this country. They argue that slurry pipelines would be a redundant transportation system, that rail transport is more versatile, and that a healthy railroad industry is vital to the nation. Their concern is that competition from coal pipelines would reduce their coal traffic (or the increase in that traffic) and keep rates at moderate levels, thereby dealing a crippling blow to their industry's recovery efforts.

Coal pipeline supporters respond that, with worldwide demand for coal growing rapidly, there should be enough business for all competing methods of transportation. If U.S. coal production doubles in ten years to 1.4 billion tons, and if all the coal pipelines now planned are built, the pipelines would be carrying only 150 to 170 million tons by 1990, leaving the railroads with almost two times more tonnage to move than they move today. Indeed pipeline supporters question whether the railroads, which are struggling now to carry the existing coal traffic, can even generate the capital needed to expand their systems sufficiently to handle their share of the projected increase.

The railroads also argue that federal eminent domain authority is not necessary for slurry pipelines. At least one coal pipeline company, they point out, has been able to obtain the needed "windows" through railroad surface rights-of-way in the West. Pipeline advocates counter, however, that these "windows" are often in locations that produce a circuitous route. Also, they can be obtained only in the West and only



	Annual Capacity (millions of tons)	Length (miles)
(1) Ohio	4.8	273
(2) Black Mesa	1.3	108
(3) Allen-Warner Valley	11.6	183
(4) Pacific Bulk	10.0	650
(5) NICES [a]	25.0	1,100
(6) San Marco	10.0	900
(7) Texas Eastern	22.0	1,260
(8) ETSI [b]	25.0	1,387
(9) Continental	25–55.0	1,500
(10) VEPCO [c]	5.0	350

a Northwest Integrated Coal Energy System **b** Energy Transportation Systems, Inc. **c** Virginia Electric & Power Co.

Source: Slurry Transport Association.

through long and costly litigation, successful because some western states (nine, in fact) have eminent domain laws for coal pipelines and because not all of the railroads' rights-of-way in the West are owned in fee simple. But in the East, by contrast, only a few states have such laws and railroads have complete title, so that any crossing by competitive transportation systems can be effectively prevented. Thus, if the pipelines are left to piece out their routes as best they can under existing law, eastern coal-producing regions would suffer a distinct transportation disadvantage. (This argument loses some of its emotional appeal when one reflects that the eastern states' disadvantage is of their own making, since they can enact eminent domain laws of their own.)

Finally, coal pipelines raise the issues of water and the environment. The slurry process uses huge amounts of water—one ton for each ton of coal. For this reason the western states, whose water tends to be scarce, insist that any eminent domain legislation should in no way abridge state water rights. As for environmental issues, the problem of what to do with the "dirty" water after it has been re-separated can be handled, according to the Environmental Protection Agency, by treating it for various uses (like cooling systems) as well as for discharge. There also exists a more general environmental concern about the adverse effects of expanded mining and burning of coal—a concern now somewhat eased by the implementation of strip mining and air pollution laws.

Coal pipeline enthusiasts, for their part, claim substantial economic advantages for their ventures. First, pipelines are an inherently efficient transportation mode. The line proposed by Continental Resources Co. for moving coal 1,500 miles from the Kentucky region

to Georgia and Florida is projected to save electric consumers $4 to $8 billion in fuel transportation costs in the 1990s. Approximately two-thirds of the cost of operating a pipeline stems from the fixed costs of construction. Once in the ground, the highly automatic aspects of a pipeline give it an inflation advantage over the railroads, whose cost structure is heavily weighted by inflation-sensitive factors —labor and fuel. Second, because slurry pipelines can be easily interconnected with barges and other vessels, one can foresee the development of new, efficient systems for the loading and ocean transport of coal. Their use would help relieve existing bottlenecks at traditional export sites, which is necessary if any major expansion in coal exports is to occur. Third, pipeline promoters are not asking for any federal subsidy; in addition, while sale of rights-of-way would be compelled by federal eminent domain power, the companies would have to purchase the rights at fair value.

With coal pipelines now proposed in the East as well as the West, legislation to facilitate their development is no longer a regional issue and is gaining support. Nevertheless, the prospects for passage this year appear dim.

The coal pipeline controversy, however it may be resolved, is a refreshing reminder that federal governmental powers are useful not only to restrain but also to facilitate productive economic activity. Come to think of it, that was one of the principal purposes for their creation. In the present instance, the benefit promised is a national one, but regional or (in the case of the railroads) competing economic interests prevent its achievement. Of the objections to invocation of federal power, surely the environmental protection and water-use issues deserve to be considered. That is to say, those objections must be met on their merits—for if we ought not to be mining and burning huge quantities of coal or consuming huge quantities of water for those purposes, the rights-of-way legislation has no legitimate claim on our national attention. The issue of railroad viability, on the other hand, does not belong in the debate. Even if it is in the national interest to subsidize the railroads, there is nothing to be said for applying that subsidy through the preservation of economic inefficiences—nothing, that is, except the fact that it renders the burden of the subsidy invisible, immeasurable, and inequitably distributed among our citizens. Instead of pressing their case against coal pipelines, the railroads would be better advised to rest content with the not inconsiderable advantage that greater competition in coal haulage can provide: namely, the increased assurance that they will be able to reap the benefits of their own deregulation. Their newly enhanced rate flexibility will be less subject to regulatory frustration and political attack to the degree that the marketplace gives consumers alternate methods of transportation.

It would be ironic if the present Congress, which has done much to end the technique of subsidy-via-inefficiency as practiced by the ICC, should itself embrace that technique.

Legislative History Reconsidered

Federal legislation authorizing regulatory programs has provided some significant victories for those who decry a narrow, textual approach to statutory construction and support the most far-ranging judicial inquiry into legislative intent. The "plain-meaning rule" has been an intellectual laughing stock ever since a statute prohibiting the interstate transportation of any woman for an "immoral purpose" was used to convict a California politician's son for taking his girlfriend to Reno, Nevada, for a night of unconnubial bliss. Cases involving the authority of the Interstate Commerce Commission, the meaning of the antitrust laws, the interpretation of tax statutes, and the authority of the Environmental Protection Agency have been among those illustrating the creative uses of legislative history to produce results not only unapparent but even implausible to one eying the words of the statute alone.

At a time when regulation was regarded as an unmitigated good, this judicial willingness to look behind a statute's words was natural enough. The use of legislative history would enable "fine tuning" of regulatory programs—to cover situations not envisioned by the statutory language and to provide a safeguard against the manipulativeness of lawyers and their clients. Often the responsible agency would be deeply involved in the drafting process, and the legislative history would bear revealing traces of that activity.

With today's fresh enthusiasm for deregulation, one might expect something of an about-face, and it appears to be occurring. In a number of recent opinions, the Supreme Court has construed agency authority restrictively, giving far more attention to the limited words of the statutes involved than to general expressions of facilitative purpose in the legislative history. In such cases as *Tennessee Valley Authority* v. *Hill* (1978) and *Securities and Exchange Commission* v. *Sloan* (1978)—the Court has appeared to take the position that the "literal or usual meaning" of a statutory provision is binding on the courts unless it would lead to absurd results or would thwart the obvious purpose of the statute. Congress, in other words, must be taken to have meant what it said in enacting the statute, and not given the benefit of any second thought that might appear to emerge from the legislative history unless some indication arises from the textual source that reference to that material is or might be helpful. The legislative effort of Senator Dale Bumpers (Democrat, Arkansas) to overcome "the presumption of validity" which he believes now attends agency action would capture this rule in statutory form for questions of agency authority: not unless a grant of agency authority appears clearly on the face of the statute, or in light of the statutory text and strong legislative history, would an agency be considered to have the authority for challenged regulatory action. Plainly, when regulation is no longer an unquestioned benefit, it becomes more appropriate to require agencies to demonstrate clearly the premises on which they act.

A recent decision of the U.S. Court of Appeals for the District of Columbia (also, incidentally, in the service of deregulation) illustrates yet another reason for increasing judicial skepticism about the uses of legislative history. *National Small Shipments Traffic Conference* v. *Civil Aeronautics Board* (1980) involved a challenged rule that exempted domestic air-cargo carriers from filing tariffs with the CAB, from providing air transportation service on reasonable request, and from filing their agreements with other carriers affecting domestic air transportation. The rules in question were adopted in response to the cargo deregulation provisions of the 1977 Amendments to the Federal Aviation Act, provisions that completely overhauled federal regulation of the air-cargo industry. Those provisions eliminated virtually all CAB control over entry into the air-freight business and most controls over rates; they also gave the CAB broad authority to grant exemptions from other regulatory requirements. The board's authority to issue the rule was plainly supported by a literal reading of the exemption clause.

The air-cargo deregulation proposal had received scanty consideration in Congress. It was introduced on the floor of the Senate as an amendment to a bill dealing with an entirely different subject, already passed by the House. When the bill thus amended went to conference, the conference committee agreed to the cargo deregulation provisions, which therefore came before the House on the motion to adopt the conference report. The only written legislative history in either house was the conference report. And that report stated:

> The Managers do not contemplate that the Board will exempt carriers from the requirement of filing tariffs. Tariffs provide valuable notice of rates to users of air transportation. Tariffs will be necessary for the Board to effectively carry out its duties to determine whether rates for the transportation of property are discriminatory, preferential, prejudicial, or predatory.

Conference reports have long been regarded as a very strong form of legislative history; they appear in printed form—before both houses of Congress—and are generally thought to be accepted in both places as reliable indicators of the bill's meaning. Particularly because of the unusually hasty and uninformed legislative action on this bill, one might have thought that the conference report's assessment of what is "necessary for the Board to effectively carry out its duties" under the legislation would carry especially great weight. Then, too, the subsequently enacted Airline Deregulation Act of 1978—which, though it did not deal with cargo questions directly, was part of the same deregulatory movement as the statute under which these rules were adopted—supported the challengers' arguments that Congress contemplated a *gradual* course of deregulation, with a retention of tariff filing requirements.

The D.C. circuit court put this legislative history aside in the face of statutory language

clearly authorizing the board's action. Its refusal to rely on the conference report struck a broader—but well-warranted—note of skepticism about the uses and abuses of legislative history. "Courts in the past," the court observed,

> have been able to rely on legislative history for important insights into congressional intent. Without implying that this is no longer the case, we note that interest groups who have failed to persuade a majority of the Congress to accept a particular statutory language often are able to have inserted in the legislative history of the statutes statements favorable to their position, in the hope that they can persuade a court to construe the statutory language in light of these statements. This development underscores the importance of following unambiguous statutory language absent clear contrary evidence of legislative intent.

Few are likely to propose a return to the days of unthinking, uncritical reading of statutes. Context and general purpose have unquestioned importance, and indeed on reading the court's opinion in *National Small Shipments* one is struck that each received its fair due. But—particularly with the burgeoning of congressional staff and well-financed legislative lobbying—abuses of legislative history have become commonplace. Passages in some committee reports address subjects nowhere discussed in the bill; others, like the one in the air-cargo case, express desires for implementation that their authors were unable or unwilling to reduce to statutory requirements. Costly hours and large amounts of resources are thrown into the effort to influence the committee report as well as the statute itself. And of course Congress does not enact these reports. Even the proposition that they are read, rather than prepared for their possible impact upon later events, is increasingly an amiable fiction —at least if the reader is supposed to be the harried senator, the person who actually casts a vote. The senator will have time only for a hasty conversation with an aide, who will have no time to explain whether tariffs will, or will not, continue to have to be filed.

The basic problem *is* one of balance. Members of Congress, their staffs, and those who try to influence them cannot help noticing that congressional reports have their uses, not only within Congress, but also after Congress has finished its work. If one is persuaded that the use within Congress predominates, then it makes sense to rely upon these materials as significant indicators of the meaning of the legislation to which they refer. At one time, this was undoubtedly the proper assessment. But it is an elementary principle of science that the effect of observation may be to render imprecise, even alter, that which is being observed. Seeing that congressional reports were influential upon later events, those who wished to shape those later events inevitably turned their attention to shaping the congressional reports. Noting this, the D.C. circuit has quite properly suggested greater caution in the future use of committee and conference reports as instruments of judicial interpretation.

The Hospital Industry's New Vulnerability to Antitrust

Having long been spared close scrutiny by antitrust enforcers, health-care institutions have grown accustomed to allocating markets by mutual agreement rather than by market competition. Some government agencies, convinced that effective competition is unlikely, have condoned, even supported, the practice.

In May 1980, however, the Antitrust Division of the Department of Justice denied its imprimatur to such collective decision making not sanctioned by explicit statutory authority. That denial appeared in an Antitrust Division "business review" letter advising the Central Virginia Health Systems Agency (the federally funded planning agency for the Richmond area) that the department could not rule out antitrust challenges to CVHSA-sponsored agreements among competing hospitals—even agreements intended to eliminate "excess capacity" identified in CVHSA's local health plan.

CVHSA is not the only health systems agency (HSA) that has sought to eliminate "excess" capacity by inducing hospitals in its area to negotiate voluntary agreements. HSAs generally view such arrangements as valuable tools for bridging what they regard as a gap in the planning program. The planners note that state certificate-of-need agencies, which regulate *new* capital investment in the health-care sector, are

not authorized to eliminate *existing* excess capacity and thus are powerless to make the quantity and configuration of health services conform to health plans. Therefore, some HSAs —which are not government agencies at all but rather private, nonprofit corporations set up as advisory bodies by the planning law—have undertaken the task themselves. An apparently effective technique has been to persuade two institutions to enter into a so-called closure agreement whereby only one will offer a service currently being offered by both. Thus, one hospital might agree to give up its inefficiently small maternity service if another will agree to close its lightly used emergency room.

In refusing to bless the planners' practice of brokering agreements not to compete, the Antitrust Division addressed the issue primarily as a technical question of statutory construction—that is, whether Congress created an implied antitrust exemption for such agreements when it passed the health planning legislation in 1974 and amended it in late 1979. The principles for determining whether an implied exemption exists are well established. Implied exemptions are not, the courts have held, to be found lightly but only where they are necessary to enable regulatory programs to work as Congress intended; and their scope is to be no broader than that objective demands.

Although the 1974 federal planning law calls upon HSAs to "reduce documented inefficiencies, and [to] implement [their] health plans . . . with the assistance of individuals and public and private entities . . . ," the Justice Department concludes that this does not clearly indicate that HSAs are to implement their health plans by brokering agreements among competitors. In the department's view, the provision cited is entirely consistent with Congress's having envisioned only *unilateral* decisions to withdraw from the marketplace. The legislative history of the 1979 amendments provides some support for this position. Although the relevant committees were briefed on the then-pending CVHSA issue and the Department of Justice's likely opinion, they did not draft a statutory exemption for the disputed activity, nor did they endorse it in their committee reports. The closest they came to addressing the issue was a statement in the House report that HSA actions "necessary" to carry out statutorily "prescribed" functions are exempt, while those that are not necessary "are not authorized and therefore not immune from the application of the antitrust laws."

Despite what it clearly regards as firm legal foundation for its conclusion that HSA-sponsored market allocation is not exempt from the antitrust laws, the Department of Justice went out of its way in the business-review letter to speak in cautious—even conciliatory—tones. But this did not mollify planning groups. Assisted by the Department of Health and Human Services, they quickly began to marshall new arguments for immunizing HSA-sponsored closure agreements. The most important of the new arguments is founded on the proposed regulations for implementing the 1979 planning amendments. These would require health-care institutions to obtain the approval of the state certificate-of-need agency before terminating a service or closing a facility. Planners argue that this assurance of government scrutiny and approval would provide the necessary protection against undesirable closure agreements. They also argue that, under such a scheme, any proposed closure agreements that were submitted to such an agency could be considered part of legitimate efforts to petition the government, and thus be exempt from antitrust laws.

The recent decision of the Eighth Circuit Court of Appeals in *National Gerimedical Hospital and Gerontology Center* v. *Blue Cross of Kansas City* (July 1980) will also bolster the planners' position. The court held that Blue Cross does not violate the antitrust laws when it denies "member hospital" status to institutions built without the approval of the appropriate HSA. To reach that decision, the court carved out a broad antitrust exemption for private firms working with HSAs in pursuit of the general goals of the planning act.

If, as expected, the Department of Justice holds to its current position, the planners could still prevail by pressing their case for an antitrust exemption in the next Congress. That would present the basic issue in its starkest form—whether a system of HSA-conferred exemptions from the antitrust laws is compatible with the preference for competition expressed in the 1979 health planning amendments. (See Clark Havighurst and Glenn Hackbarth, "Competition in Health Care: Planning for Deregulation," *Regulation*, May/June 1980.)