The New DOT Takes on Transportation Regulatory Policy

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Introduction: DOT and the Regulatory Challenge

The Department of Transportation Act of 1966 was predicated in large part on Congress's finding that America required "the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation at the lowest cost consistent therewith…"[1]

Moreover, the Act said, it was necessary to establish the new agency, among other things, to --

- "make easier the development and improvement of coordinated transportation service to be provided by private enterprise to the greatest extent feasible;" and

- "provide general leadership in identifying and solving transportation problems…."[2]

[1] Department of Transportation Act, Public Law 89-670, 80 Stat. 931 (Oct. 15, 1966), §2(a). Interestingly, while every Secretary of Transportation has routinely declared that "safe" transportation is DOT's top priority, Congress in fact placed "fast" first in its list of statutory objectives.

[2] *Id.*at §2(b)(1).

There was a small problem with this ambitious mandate, however. Back then, more than a decade before the advent of transportation deregulation, a lot of transportation policy was being made by three independent regulatory agencies – the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Maritime Commission. Their authority, like the Secretary's, had been delegated by Congress and had not been diminished by anything in the DOT Act. Indeed, even though the statutes allowed the President to appoint members of these tribunals (with Senate approval), the agencies themselves were technically arms of the Congress. With only minor exceptions, they were not subject to Administration oversight or direction. Their members all had fixed terms and could be removed only for cause, not for policy differences.

The administration bill proposing to establish DOT had been prepared, at President Johnson's behest, by the Department of Commerce under the supervision of its Under Secretary for Transportation, Alan S. Boyd. Boyd had earlier been a member and then Chairman of the CAB and had formed strong views about the extent to which traditional economic regulation had begun to outlive its usefulness. It was also clear that maintaining different regulatory regimes for different modes was inconsistent with developing the "coordinated transportation service" the bill drafters felt was so badly needed. Accordingly, the draft bill that Boyd and his team drafted for President Johnson proposed measures that would phase out the independent agencies' authority.

Interviewed decades later, Boyd said that President Johnson was sympathetic but felt that proposing deregulation and a new Cabinet-level department simultaneously would ensure the failure of both objectives. He therefore insisted that the deregulation language be omitted in the interest of a bill that could be passed quickly. Indeed, in sending the bill to Congress on March 2, 1966, President Johnson wrote: "the Cabinet-level department I recommend will not alter the regulatory functions of" the various agencies. It was a prescient decision: the Department of Transportation Act passed within a matter of months; deregulation would not happen for a dozen more years.

During hearings on the bill, members of Congress were still suspicious. They wanted to know how the new Department would deal with issues that were the province of the ICC, CAB, and FMC. Appearing on behalf of the Johnson administration, Cecil Mackey – who would become DOT's first Assistant Secretary for Policy and International Affairs – said: "The kinds of cases I think the Department of Transportation should participate in are those which concern broad issues of national transportation policy."

President Johnson nominated Alan Boyd as America's first Secretary of Transportation. He was quickly confirmed. Upon taking office on April 1, 1967, he immediately began the process of moving policy in a historic new direction. He created a staff of attorneys and economists and directed them to intervene in significant ICC, CAB, and FMC proceedings for the purpose of advocating, on the record, greater flexibility and a more rational approach to the regulation of transportation. The Department would respect the statutory mandates of the three agencies but would advocate positions based on the administration's reformist policy convictions. The positions advocated by DOT would be accepted or rejected wholly in keeping with the agencies' discretion. In other words, DOT's ability to affect those elements of transportation policy vested in the independent transportation regulatory agencies would be a function of the quality of the Department's evidence, analysis, and advocacy.

The DOT team

I joined DOT as a regulatory litigator in the spring of 1968. I had cut my teeth during two years at the Federal Power Commission working on natural gas pipeline rate cases. I wanted to learn about economic regulation in other sectors, however, and working with the team at the new DOT seemed like the perfect way to do it.

And what a team it was! It was led by a young assistant general counsel, Peter Craig, who was quite simply the smartest regulatory lawyer I've ever known. Craig had come to DOT from Covington & Burling where he had acquired an astonishingly sophisticated mastery of transportation regulatory jurisprudence. Working closely with intellectual giants in DOT's policy office – Cecil Mackey, Jim Nelson (on leave from Amherst), Ira Dye, Jim Miller (years later, Director of OMB), Don Agger, Bob Calhoun, Frank Bohan, and others – he oversaw DOT interventions in every ICC, CAB, and FMC proceeding that was deemed to present a significant transportation policy issue.

Despite DOT's avowed respect for the independent agencies' authority, the Department's strategy was controversial from the start. First of all, the agencies believed *they* were the appointed repositories of the public interest in their subject matter areas – not DOT -- and so it was awkward to have DOT appearing before them and purporting to instruct them on what the public interest required.[3]

A further complication arose at the appellate stage. Decisions of independent regulatory agencies were appealable in court. If DOT's arguments were rejected, the Department might well want to seek

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[3] "Executive Intervention in Rate Cases Stirs Debate on Regulatory Policies," *National Journal*, July 19, 1970, p. 152.

judicial review. When an aggrieved private party filed an appeal from a regulatory decision, the Civil Division of the Department of Justice would defend the agency's decision. The DOJ's Civil Division also represented DOT, however. Obviously DOJ couldn't represent both sides in a dispute between DOT and a regulatory agency. So DOT's ability to challenge in court an agency decision it didn't like might well be compromised by DOJ's view of the stronger position. In effect, DOT had to "litigate" before the Civil Division first and win its support.

Advocating intermodalism

These complications notwithstanding, DOT stayed the course. Among DOT's most important contributions through its participation in these agency proceedings was the advancement of intermodalism.[4] With different agencies regulating different modes of transportation, efforts by the different modes to work with each other had become excessively complicated and inefficient. Jurisdictional conflicts had become an increasingly nettlesome impediment to the coordinated and efficient transportation system DOT was supposed to encourage.

Peter Craig and his team monitored regulatory agency proceedings closely. They found no dearth of opportunity to advocate change in the interest of a more efficient, more coordinated, and indeed more rational approach to transportation regulation.

In retrospect, the cases are amusing. My favorite was the *Substituted Service Investigation*.[5] The CAB launched the proceeding in order to revisit air carriers' longstanding practice of shipping freight by truck in order to expedite a delivery that might otherwise have been delayed because of weather, a mechanical defect, or some other anomaly that prevented the air carrier from moving the freight by air. The Board wondered whether it was fair in such cases that shippers who had paid a premium for air transportation might get only surface transportation. What rate should they pay? What notice should air carriers provide of their substitution of motor service for air service?

DOT's view, captured in a 28-page brief that included a tour of substituted service through history (e.g., stage coaches on ferry boats), was that the Board should leave everything just the way it was. An air carrier using substituted service had turned itself into a shipper vis-à-vis the motor carrier and would pay whatever rate the motor carrier required for the movement in question. The air carrier's customer – the actual shipper – would have no interest in the air carrier-motor carrier arrangement as long as the freight reached its destination in keeping with expectations. The only notice required should be set forth in the air carrier's tariff, noting that substituted motor-for-air service would be used at the air carrier's discretion when necessary to ensure timely delivery. The Board went along.

But persuading the CAB not to complicate the practice of substituted service with unnecessary regulation wasn't sufficient; we also needed to address the question with the ICC as well. Looking at exactly the same practice in the context of an application by some truckers for contract carrier authority, the ICC had held that the only way an air carrier could put freight on a truck was (1) if it had established a through route, joint rate agreement with the motor carrier, or (2) if it had applied for and obtained surface freight forwarder authority

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[4] The terms "intermodal" and "intermodalism" did not actually find their way into DOT's enabling legislation until a quarter-century after the passage of the DOT Act. They first appeared in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Public Law 102-240, 105 Stat. 1914 (Dec. 8, 1991). Title V of ISTEA added to the Department's mission a mandate to "coordinate Federal policy on intermodal transportation and initiate policies to promote efficient intermodal transportation in the United States…." ISTEA, § 5002, 105 Stat. 2158, now codified at 49 U.S.C. §301. The 1991 legislation also established within DOT an Office of Intermodalism and an Advisory Council on Intermodal Transportation.

[5] CAB, *Substitution of Other Service for Air Transportation Rule Proceeding*, Docket 19797 (1969).

from the Commission. "The Commission's decision," DOT wrote, "if permitted to stand, would be a step backward in the quest for an efficient, coordinated system of transportation." [6]

In other proceedings, the Department successfully persuaded the CAB to allow long-haul motor carriers to acquire air freight forwarding companies for the first time;[7] persuaded the ICC to allow trucks and buses to deviate from authorized routes in order to take advantage of the new Interstate System;[8] argued that the CAB should extend the exemptions from economic regulation enjoyed by smaller air taxi operators to the operators of larger commuter aircraft,[9] and asked the CAB to relax restrictions on air taxi operators in order to the Northeast Corridor.[10]

Advocating transportation "at the lowest cost"

Of all of DOT's regulatory interventions, its participation in ICC motor carrier rate cases was by far the most controversial. Organized into "motor freight bureaus," long-haul truckers could not raise their rates without approval from the Commission. The LBJ administration was keeping an eye on inflation and thus instructed DOT to challenge a number of rate increases that might otherwise have been approved routinely. We did so and inadvertently discovered a classic case of a regulatory agency captured by the industry it was meant to regulate.

Perhaps the most visible of these cases was one involving a rate increase sought by the Middlewest Motor Freight Bureau.[11] The simple question before the Commission, as always, was whether a rate increase sought by the proponents was "just and reasonable" within the meaning of the Interstate Commerce Act. Motor carrier rate increase applications typically followed the renegotiation of labor contracts. If the Teamsters had won a 5% increase in wages during a contract renegotiation, the motor carriers promptly showed up *en masse* at the ICC to ask that they be permitted to pass the increase through to shippers through higher rates. The Commission had typically gone along.

But things had begun changing after DOT started showing up. Using the formidable economic talent available within its new Policy office, DOT attacked the truckers' rate justifications with highly sophisticated and multi-pronged analyses. We looked at the truckers' cash flow, capital structure, rate of return on investment, and turnover. We cross-examined their witnesses in hearings, challenging the quality of their traffic forecasts and their expense projections. We produced powerful evidence of the benefits truckers had enjoyed through new, technology-driven efficiencies in logistics, better roads, and other factors. The truckers, we were able to show in case after case, had simply failed to demonstrate the need for the rate increases they sought.

The effort was successful in the *Middlewest* case; the Commission denied the proposed rate increase in keeping with the Department's position. But the case involved a new wrinkle. Under ICC procedure, the Commission could permit truckers to begin collecting a proposed increase even before its justness and reasonableness had been assessed. According to Commission regulations, if any part of the proposed increase was disallowed at the end

[6] ICC, Petition for Reconsideration of the Department of Transportation, in A.A.A. Cartage, Inc., Contract Carrier Application, Docket MC-127730 (Sub-No. 1), p. 8.

[7] CAB, *Motor Carrier-Air Freight Forwarder Investigation*, Docket 16857 (1969).

[8] ICC, *Motor Service on Interstate Highways, Passengers and Property*, Ex Parte Docket MC-65 (Sub-No. 2).

[9] CAB, *Part 298 Weight Limitation Investigation*, Docket 21761 (1970).

[10] CAB, *Northeast Corridor VTOL Investigation*, Docket 19078.

[11] ICC, *Increased Rates and Charges, from, to and Between Middlewest Territory*, Docket No. 34971.

of the Commission's proceeding, the Commission could require the carriers to refund it to the shippers who had paid it.

As sensible as this procedure seemed, however, nobody could find any evidence that the Commission had ever ordered truckers to refund a disallowed rate increase. It created a novel issue.

It had taken the Commission 13 months to render a decision on the Middlewest Motor Freight Bureau's proposed rate increase, during which time the truckers had been charging the increased rates. To the truckers' shock and dismay, the Commission for the first time in history ordered them to refund the disallowed portions to their shipper customers. Wasting no time, the truckers appealed to a friendly ICC Commissioner for relief, arguing that it was physically impossible for them to calculate and remit the refunds ordered in the time prescribed by the Commission's order. It was a successful tactic. Commissioner Laurence K. Walrath promptly issued an order postponing the Commission's deadline for making the refunds for 10 weeks – thus single-handedly overruling an order of the full Commission and giving the time they wanted to mount an effort to overturn the refund order completely.

I was one of the DOT lawyers working on the case. I can still remember the outrage I felt at the way the motor carrier freight bureaus were able to manipulate the ICC. I immediately drafted vehement objections to the postponement that Tenney Johnson, Acting General Counsel at the time, enthusiastically signed. We argued that Walrath's order represented a violation of Commission procedure and that, if the refund order were ultimately overturned, the truckers would have collected rates for 18 months that they had "failed to prove were just and reasonable." They had enjoyed interest-free use, we said, of some $6.47 million "found properly belonging to the shippers."

DOT and the shippers ultimately won the case, but it was a Pyrrhic victory. The full Commission confirmed its refund order, but then approved an immediate 6% increase.

It wasn't all for naught, however. The *Wall Street Journal*, reflecting on the case in an editorial published shortly after its conclusion, wrote:

> If this sort of price fixing had not achieved legal sanction, the chance that Midwest truck lines could have set rates that were truly "unreasonable" would be slim... . With more competition in transportation generally, it would be unnecessary for august commissioners in Washington to ponder, seemingly almost endlessly, the "proper" charge for carrying eggs from Des Moines to Chicago and steel from Pittsburgh to Paducah. ... *If the Transportation Department goes on shaking up the system, maybe more people will see the logic of a free market.*[12]

Conclusion

All told, DOT intervened in 72 regulatory proceedings during its first three years of existence: 33 before the ICC, 29 at the CAB, and 10 at the FMC.[13] These interventions, most of which were successful, cumulatively exerted a profound impact on the conduct of ICC, CAB, and FMC regulation and ultimately on regulation itself. By the end of the next decade, deregulation of airlines, motor carriers, and railroad undoubtedly seemed less radical because of the flexibility already introduced into many of the agencies' programs. Unquestionably, DOT's early advocacy had a lot to do with paving the way.

[12] *Wall Street Journal* editorial, Sept. 24, 1969 (emphasis added).

[13] *National Journal*, July 19, 1970, p. 153.

Early Policy Issues

Robert L. Calhoun

Note: I have to do this from memory since the records involved were either left at DOT when I left in 1971 or have been lost or discarded. However, I have told these "tales" to a number of people over the years and, allowing for "some improvement in the telling" I think they are fairly accurate.

The Railroad Problem

I came to DOT from the Interstate Commerce Commission (ICC) and apparently was the only person in OST having any real knowledge of the railroad industry which was extensively regulated by the ICC. DOT was still new enough that relations between OST and the modal administrations, in this case the Federal Railroad Administration (FRA), were not always warm and fuzzy. In addition, FRA at the time was a loose collection of programs—rail safety programs inherited from the ICC, high-speed ground transportation etc. However, at the same time, there were some really good people in what passed for a policy shop in the FRA—Jim Hagen, Jim McClellan and Bill Loftus with whom I developed good working relationships as the "railroad guy" in OST.

The Nixon Administration had apparently promised the railroad industry that it would tackle the industry's problems. Under Paul Cherington's direction, there was a three-pronged effort: 1) get the railroads out of the money losing passenger business; 2) find ways to enhance the industry's financial basis, and 3) reform of the economic regulatory structure.

The first item led in time to the creation of Amtrak which I think has been well-covered by the Gallamore/Meyer book. Two additional points: First, an additional take on Jeff Davis' comment on John Volpe's threat to resign over a possible veto of the Amtrak legislation. I was in a meeting in Jim Beggs' office with the folks from FRA and the Penn-Central, the first of many meetings to attempt to stave off the eventual collapse of that company. Secretary Volpe was supposed to be at the meeting but didn't' show so Beggs started the meeting without him. About a half hour into the meeting, a very wet (it was raining that day) and angry John Volpe came into the meeting, stating he had come from the White House and put his resignation on the line if the Amtrak bill got vetoed. This must be the letter Davis speaks about. I was told later that he had gotten out his car and walked partway back to DOT, accounting for the drowned look. Second, the Amtrak legislation required the Secretary to submit to Congress a map showing the proposed routes for the new passenger rail system. John Olson (C. Bakers successor as S-5) was tasked to chair this effort with myself, Jim McClellan and others from FRA and some folks whose names I do not recall from other parts of the Department We went to work with a big railroad map of the United States and a box of colored pencils. As routes were added, Jim and others from the FRA objected most of the routes being penciled made little sense from a ridership point of view and even less from a financial perspective. No matter, that was not the purpose of the drill; we wanted get the map approved so the exercise was purely political. Hence, the addition of a route from Baltimore to Parkersburg West Virginia (the "Harley Staggers Special" after the Chairman of the House Commerce Committee) or the "Vance Hartke Express" from Chicago to Indianapolis. The Map got approved but most of these "special" trains disappeared in later years.

The second part of the effort had to deal with the fact that the White House didn't want to spend any money. As a result, there were several small initiatives, two of which I was involved in.

First, a perennial problem facing the industry was a shortage of freight cars. One proposal was to make investment in freight cars more attractive by shortening the tax depreciation schedule from 14 years to five. We got Treasury to sign off on the idea at a lunch (3 martini version) with Paul Cherington and Edward Cohen(?) Assistant Secretary of the Treasury for Tax Policy and myself. This together with legislation to add a financial "incentive" to the per diem rate (the rent one railroad pays for using another railroads cars) dealt with the problem.

Second, I got a call from C. Baker's office to expect a call from Arthur Burns who at that point was a Senior Counselor to President. In due course, he called and his query concerned the arcane subject of discriminatory taxation of railroad property by state and local governments, a very large grievance of the railroad industry particularly in New Jersey and the West. As it happened, I was familiar with the issue from my days at the ICC. There had been legislation to address this issue in several sessions of Congress and I urged Burns to get the Administration to support it. I don't remember what happened after that but the subject came again and was eventually enacted as part of the Staggers Act in 1980.

Washington Airports

I may have been at DOT a week at most when I was asked to go to a meeting, chaired by Undersecretary James Beggs concerning Washington National Airport. Apart from being an occasional passenger, I knew nothing about aviation or airports. I assume I was sent as the TPI rep because I was the new kid on the block. In any event, it was a big meeting. In addition to Jim Beggs, others at the meeting who later became famous in other ways included C. Baker (in his then capacity as Deputy Undersecretary (S-5) and Jim Wilding, then Manager of Washington National Airport (WNA) and later the first President and CEO of the Metropolitan Washington Airports Authority.

Issue on the table—the need to upgrade Washington National Airport (WNA). WNA, constructed in 1940, and Dulles International Airport (IAD), opened in1961, were the only two civilian airports in the country owned and operated by the Federal Government, under a division of the FAA called the Bureau of National Capital Airports or BUNCA. BUNCA was headed by Arvin Saunders and it was his task to convince the assembled group to support the expenditure of several millions to modernize WNA. As support, BUNCA had commissioned a fancy study of the needs and plans for WNA. Apart from money issues, the more fundamental issue was the future status of WNA. If I recall correctly, the original idea been to shift all air traffic to IAD, particularly in light of the introduction of jet plane service in the late '50s, and close WNA or limit it to General Aviation. However, the convenience of WNA to members of Congress and others of influence soon precluded that, while opposition to jet noise in Arlington and Alexandria seemed to block any new money for improvements.

I do not recall how it evolved, but the discussion started to turn in the direction of getting the Federal Government out of the airport business. Not surprisingly, the FAA thought this was a terrible idea. There was semi-serious discussion of putting them up for sale to the airlines or some other private entity. On paper, WNA showed a profit since no real money was being spent on it while Dulles was an expensive white elephant. That idea got dropped. Regionalism was all the rage with the recent establishment of WMATA and thoughts turned to doing the same thing with the airports. Paul Cherington, working with the FAA, was tasked by the Secretary to undertake this effort. Somewhere along the line, it was thought important to make this effort truly regional by including Baltimore's Friendship (as it was then called) Airport in interstate compact. The high point for me was the meeting between Cherington and staff and members of the Baltimore Airport Board. The contrast could not have been greater. For those who remember Paul Cherington, he was the very essence of the Harvard B School from whence he had come in dress, accent and manner. He was also not that tall. By contrast, the Baltimore representatives were mostly quite tall and gave the general impression of being kind of folks you would not want to meet on dark night. The meeting did not go well.

After some further travail, a bill to create a regional airport authority to operate WNA, and IAD and Friendship (if it wanted in) was introduced by Senators Mathias (MD) and Spong (VA). At the Senate hearings on the bill, Secretary Volpe was doing fine until he was asked an out of left field question about how the METRO system then under construction was going to pay its operating cost. As I recall the situation, he responded that the "profits" from WNA could help. The bill vanished.

Epilogue

With the failure of the compact bill, WNA continued to decay with leaking roofs, falling plaster and the like. Except for two small terminals built by the airlines at the far end of what is now Terminal A, no real improvements were made in WNA until the creation of the Metropolitan Washington Airports Authority.

President Ford and Deregulation

John W. Snow

In early 1975, there was growing concern in the White House about the state of the economy -- slow growth, rising inflation, high unemployment and an incipient budget deficit. These were the days of the "Whip Inflation Now" buttons and the beginning of what became known as stagflation. As part of the government's response, President Ford established a working group drawn from the major cabinet agencies to identify ways in which government policies and rules might be contributing to the problem. Secretary Coleman asked me to serve as the DOT representative on the council known as the President's Domestic Policy Review Group. Our task was to identify government-imposed impediments to greater efficiency and productivity to the US economy. My task was to coordinate the Department's internal effort in response to the Department's request; and as it turned out we had a lot to contribute.

Since its earliest days the Department had been making the case for less regulation of the transportation industries. Despite a great deal of good work, those efforts had not met with great success either in Congress or in the key regulatory agencies -- the Interstate Commerce Commission, which regulated rates for surface transportation, and the Civil Aeronautics Board, which regulated rates for air travel.

President Ford's charge to the Domestic Policy Review Group gave renewed impetus to the Department's efforts and in the end put us at the forefront of the deregulation movement. A year earlier the Department had submitted rail reform legislation to the Congress as part of our efforts to revitalize the railroad industry in the wake of the collapse of the Penn Central and other eastern rails. In response to the President's directive, we developed a revised and more far-reaching proposal, the Railroad Revitalization Act, which went to Congress in May of 1975.

We also reviewed prior analytical work in the Department on the aviation and trucking industries which suggested they were ripe for regulatory reform as well. Aviation and trucking appeared to be naturally competitive industries that were being regulated as if they were public utilities with tight controls on entry, exit and pricing to the economic detriment of passengers, shippers, and the economy as a whole. To no surprise, the trucking and aviation regulatory system enjoyed broad support among carriers, the labor unions, and even the capital markets, which saw deregulation as a threat to the financial stability of these companies and to their bond holders. The status quo was deeply entrenched, enjoying powerful political support. In pushing for reform, we knew that the Department faced an uphill battle to change the system, and would bear a heavy burden of proof to get proposals approved by the White House and acted upon by Congress.

In developing our reform proposals for motor carriers and aviation, we decided we needed to supplement the traditional academic economic efficiency arguments with real-life on-the-ground examples of how regulation operated in practice, pointing out the absurdity and waste associated with it. So our internal team undertook a close examination of some of the rules and how they worked in practice. What we found was both humorous and telling, providing many anecdotes which were to become part of our case for reform.

For example, we identified a number of motor carriers that had a license to haul a shipment from point A to B, but were not allowed to haul a return shipment back from B to A thus resulting in many empty miles and lots of extra costs. The energy crisis the country was going through at the time underscored the need for change and we quantified the enormous amount of wasted fuel caused by the limitation on backhauls.

The CAB had a lot of regulations which were equally absurd. One required air carriers to use small inefficient planes rather than the larger and more efficient planes that were readily available, so it took a lot more planes, a lot more fuel and a lot more pilots to move a given amount of freight. The CAB's pricing rules caused the airlines to charge fares that were far above a competitive market level, denying passengers the kind of low-cost airfares that we take for granted today while planes flew half empty, again a great waste of fuel.

Relying on our internal efforts to document the failures of motor carrier and aviation regulation, the Department produced two far-reaching legislative proposals over the next ten months -- the Aviation Act of 1975 which was sent to the Congress in October and the Motor Carrier Reform Act which went to Congress in November. These two proposals -- along with the earlier rail measures -- served as a high water mark for the Domestic Policy Review Group. I think it's safe to say that DOT had the most ambitious program for regulatory reform of all the cabinet agencies and proved most responsive to President Ford's request.

In getting these proposals out of the White House and up to the Congress, the Department was blessed by the extraordinary leadership of Bill Coleman and John Barnum; both talented, experienced lawyers with a gift for advocacy. They championed the Departments' deregulation efforts and made possible the favorable White House response. Bill Coleman had a wonderful perspective on the role of a cabinet secretary. I recall being with him at some point in his office where he gestured east to Capitol Hill and then west to the White House and said: "Your job is to get me good ideas, good proposals; and then my job is to take them to both of those places." And that's exactly what he did for the Department's deregulation program.

But getting Bill on board was no cakewalk. On the aviation proposal, he had to overcome deep reservations about how deregulation would work in practice. At one of our meetings he said: "If we have free entry into the aviation industry, what's to stop some fly-by-night operator leasing some cheap old equipment and putting it into service at bargain basement prices that are ruinous for the other airlines?" We eventually convinced him that there were ample protections for this kind of scenario. But dealing with his skepticism and the Deputy Secretary's probing questions made us all much better advocates with both the White House and the Congress.

While our efforts did not yield legislation during the Ford years, I think it's safe to say that the work DOT did during the Ford Years on transportation regulatory reform paved the way for the air and truck deregulation that came only a few years later and I think all of us who worked at the Department can take great pride in our efforts.

The USDOT's Leadership In Railroad Deregulation

Eric Beshers, Steven Ditmeyer, and
Robert Gallamore

Economists and other analysts had long called for economic deregulation of U.S. railroads, but genuine political support did not appear until the 1970s. The driving force was the bankruptcy in 1970 of the Penn Central, a large railroad in the Northeast, together with the bankruptcies of several other, smaller, northeastern railroads and a couple of middle-sized Midwestern railroads. The Penn Central bankruptcy was the largest bankruptcy in American history up to that time, and it made clear beyond any doubt that the railroad industry was in severe financial straits. For a brief time, nationalization was actually discussed as an option, although most parties found that idea to be distasteful. Realizing that substantial and unprecedented new efforts would have to be made in order to ensure continued railroad service in the Northeast, however, Congress created a new railroad company, Consolidated Rail Corporation (Conrail), to take over and operate the assets of the bankrupt railroads. Conrail, it turned out, was necessarily owned by the federal government for several years (in contrast to long American tradition) before its securities could to be sold to the general public, i.e. to private investors.

By the time Congress was grappling with the problems of establishing Conrail as a publicly owned if not operated railroad,[14] it was widely accepted that excessive regulation was one of the major causes of railroad financial problems. Other principal factors were that freight railroads were required internally to cross-subsidize deficit-producing passenger operations, and the increasing importance of rail-competitive intercity motor carrier service as new links the modern Interstate Highway System were being completed. Additionally, the Northeast railroads in bankruptcy were burdened with too many employees under restrictive labor agreements, and too many miles of lightly-trafficked, redundant, and consequently under-maintained rail lines. Congress largely resolved the regulation issue in two major pieces of legislation: The Rail Revitalization and Regulatory Reform Act of 1976 (the 4R Act) and the Staggers Rail Act of 1980 (named for Representative Harley O. Staggers (D-WV), a Congressman who was instrumental in securing the enactment). The 4R Act dealt with a number of major railroad issues aside from regulation. The Staggers Act was primarily concerned with lessening the regulatory burden on railroads, then estimated by economists to cost the economy at least two billion dollars annually.

Deregulation of Railroads in Brief

Rail regulation was transformed during the period 1973-1985, and it changed yet again in 1995. There were six stages in the process:

1973—Passage of the Regional Rail Reorganization (3R) Act, establishing the United States Railway Association to plan consolidation of the bankrupt Northeast railroads.

1976—Passage of the 4R Act (described further below)

1976–1980—Lukewarm implementation of the 4R Act by the Interstate Commerce Commission (ICC)

1980—Passage of the Staggers Rail Act (also discussed in more detail below)

1980–1985—Initial actions by railroads and

[14] The main precedent in U.S. railroad history was the reverse: Under emergency mobilization during World War I, the federal government took over control of all railroads, but not their ownership, which was left with private companies.

shippers to take advantage of Staggers Rail Act reforms, including especially with more reliance on private carrier-shipper rate and service contracts, more rate flexibility, and easier line abandonments or transfers to new railroads outside traditional labor agreements.

1995—Passage of the ICC Termination Act and replacement of the 100-year-old Interstate Commerce Commission with the Surface Transportation Board (STB).

A widely-held belief is that the Interstate Commerce Commission (ICC) made the regulatory changes contained in the 4R Act ineffective through timid and cautious implementation. The members of the Commission were either afraid of, or in agreement with, the political forces opposed to deregulation. The ICC's half-hearted implementation of the 4R Act meant that the economic fortunes of railroads continued to decline through the remainder of the 1980s, a period characterized by "Stagflation" – high energy prices, general inflation, and recession, especially in the old industrial Northeast. These circumstances were the main reason Congress passed the Staggers Rail Act with its more aggressive deregulatory agenda.

The political view that the venerable but dysfunctional system of railroad regulation had to be radically changed had begun to take hold in the 1970's, but agreement was by no means universal. Not all of the railroads were ready to agree on what they wanted in the way of change, and indeed, not every railroad even recognized the need for widespread regulatory reform. Unsurprisingly, substantial economic reform is a long process, and ongoing political tension regarding the extent of railroad deregulation has persisted over the years. It is important to note, especially in view of the 50th Anniversary this year (2016) of the Department of Transportation's establishment, that the main impetus for the Staggers Rail Act came from within the Carter Administration's DOT. President Jimmy Carter had advocated lessening of federal regulation in his election campaign, and Carter appointees at DOT (in FRA and the Office of the Secretary) spearheaded drafting of the legislative vehicle. The DOT proposal was approved by the White House and sent to Committees in both the House and the Senate for further refinements, hearings, and Congressional approval, before it was signed by President Carter on October 14, 1980.

In addition to the Staggers Act, Congress enacted a number of specific strategies to strengthen Conrail, including funding for catch-up on maintenance of rail lines and locomotive fleets, buyouts of redundant employees, discontinuance of responsibility for passenger service, transfer of commuter operations (and their operating deficits) to local governments, and liberalization of rules for abandoning light density lines or shifting their operating authority and labor arrangements to other railroads. These measures enabled Conrail to become profitable in the early 1980s and to be sold to public investors in the largest Initial Public Offering (IPO) to that time, in 1987.

Key Provisions of the 4R Act and Staggers Rail Acts

Some key regulatory provisions of the 4R Act were:

***Market Dominance*:** Under the new 4R Act provisions, the ICC could not find a railroad rate to be unreasonably high unless it first found that the rail carrier had "*market dominance*" over the transportation to which the rate applied. *Market dominance* was defined as the absence of *effective competition* from other carriers or modes of transportation. This provision was designed to permit rates to be set by competition in situations in which effective competition existed. The ICC was directed to establish standards and procedures for making market dominance determinations.

Revenue Adequacy**:** The ICC was directed to develop reasonable standards and procedures for establishment of *adequate levels of revenues* (defined as the level of rates needed under economical and efficient management to cover a rail operator's *total operating expenses, depreciation and obsolescence*, plus a fair, reasonable and *economic return on capital employed* in the business).

Exemptions**:** The ICC was authorized, on its own initiative or in response to a carrier or shipper's petition, to grant *exemptions from regulation* when regulation was not necessary to effectuate the policies of Congress or would otherwise serve little or no purpose.

As documented in a remarkable report drafted by the Federal Railroad Administration and issued by Secretary Brock Adams in October 1978, *A Prospectus for Change in the Railroad Industry,* the Commission was especially weak in establishing standards for determining *market dominance* and *revenue adequacy* under the 4R Act. These administrative failings essentially meant that the 4R Act would be of little help in returning railroads to self-sustaining financial viability. Basically, the ICC made it easy for a shipper complainant to show its serving railroad had *dominance* of the relevant market. These Commission standards provided ways of establishing *market dominance* without actually addressing the issue of the presence or absence of competition. The *revenue adequacy* standards were vague and not rigorously tied to a rail firm's *return on invested capital*, and therefore it was impossible for rail enterprises to recover their *sunk costs*, whether or not they could exit the industry.

During this period, however, the Commission was changing, as terms of old members expired and they were not reappointed. The new members appointed by President Carter were strongly supportive of deregulation; by the end of the decade, these members had the upper hand and a new Chairman of the Commission was their leader. By 1978 in fact, the reformers had enough power to issue an order exempting all intermodal traffic on railroads from regulation, and a blanket exemption of traffic moving in boxcars followed.

Some key provisions of the Staggers Act were:

Rate Reasonableness and Revenue Adequacy**:** Congress made it clear that a railroad could establish any rate for transportation or other services it provided. It could price-differentiate, but it could not illegally discriminate against any persons or places. The Commission could not consider whether a rate was reasonable, however, unless it first determined the railroad had market dominance over the transportation to which the rate applied, otherwise; the Commission had no right to question a rate. Further, the Act directed the Commission, when it did consider rate reasonableness cases, to take into account the provision of the Act that railroads should have *adequate revenues*.

Market Dominance**:** Congress provided that the Commission could not find market dominance if the rate challenged were below:

160% of variable cost before September 30, 1981,

165% of variable cost in the year ending September 30, 1982,

170% of variable costs in the year ending September 30, 1983,

175% of variable costs in the year ending September 30, 1984,

and 180% of variable costs in years beginning October 1, 1984.

In the Staggers Rail Act, Congress also directed the Commission to determine whether or not ***product***

and geographic competition should be considered in making market-dominance determinations. *Geographic competition* is the ability of the shipper or receiver of the product to ship it to other destinations (or to obtain it from other sources) that do not involve the use of the rail carrier in question. For example, an electric power generating plant may be able to receive coal from several mines in different places, each mine served by a single railroad, but not all by the same railroad. The result is that no one railroad has market power over the level of rates for coal actually moving to the power plant. *Product competition* would exist in the example if the power plant had the ability to use fuel other than coal in generating electricity, e.g., natural gas delivered by pipeline.

Revenue Adequacy**:** Congress directed the Commission to set revised standards of revenue adequacy and to determine annually which railroads had been able to realize levels of revenue adequate for sustainable reinvestment in the firm.

Exemptions**:** Congress expressly permitted shippers and rail carriers to enter into rail transportation contracts that would be exempt from the jurisdiction of the Commission. Copies of these contracts had to be filed with the ICC, but were to be kept secret. In addition, Congress revised the exemption provision of the Act to *require* the Commission to exempt from regulation any type of transportation or transaction, when:

(1) regulation was not necessary to further the stated policy of Congress; and

(2) the transaction or service was of limited scope, *or* regulation was not necessary to protect shippers from an abuse of market power.

In the report accompanying the Staggers Act, Congress made clear that it intended the Commission to exercise its new exemption power aggressively, and indeed the Commission did so. The ICC soon exempted from all regulation the transportation of a wide range of commodities and products, including fresh fruits and vegetables, trailer and container on flat-car service, all commodities moving in boxcars, all agricultural products except grain and soybeans and many others. In addition, the Commission decided to exempt from regulation a broad range of structural transactions conventionally included within its regulatory scope: These included certain line acquisitions, line abandonments, and trackage rights agreements.

With passage of the 1980 Staggers Rail Act, the ICC, now dominated by reformers, aggressively implemented the new law. In the process, the Commission reversed many other policies and precedents that had long hindered the railroads' ability to be financially self-sustaining. Again, among these issues the three most important were:

Market Dominance**:** The Commission revised its market dominance guidelines permitting consideration of intermodal, intramodal, geographic and product competition in determining whether a railroad had market dominance.

Revenue Adequacy**:** The Commission revised its revenue adequacy standards and adopted an economically rigorous single factor determination of whether the railroad had sufficient revenues to earn a return on its net investment equal to its cost of capital determined on a forward-looking basis.

Rate Reasonableness and Ramsey Pricing**:** In its 1985 *Coal Rate Guidelines* decision, the Commission adopted an economically rigorous approach to maximum rate reasonableness that recognized the peculiarities of railroad operating parameters and cost structures, and explicitly allowed railroads to charge differentiated demand-based rates to recoup overhead costs using a strategy to mark-up prices over variable costs.

These mark-ups over variable costs are based on *inverse elasticities of demand*, or "perfect pricing," meaning that a customer's willingness to pay determines that commodity's contribution to overhead (also known as "charging what the traffic will bear"). The inverse elasticity rule was worked out by a British economist named Frank P. Ramsey in the1920s, and thus it is called *Ramsey pricing*. In natural monopoly situations, Ramsey pricing maximizes public utility, subject to a profit constraint covering total costs. It could not have been used under traditional ICC rate regulation, of course, and without it, solving the age-old "Railroad Problem" was impossible (see next section below).

In these complex ways the three critical issues of *Market Dominance*, *Revenue Adequacy*, and *Rate Reasonableness* came together in the application of regulatory reform legislation to the actuality of modern railroad economics, accomplished through the 4R and Staggers Rail Acts. There these three economic and regulatory principles will remain as long as steel wheels roll on steel rails and American country musicians play and sing the railroad blues.

Reprise: Why There Was a "Railroad Problem"—and Why Deregulation Was the Needed Remedy

For almost exactly one hundred years (back to the writings of Charles Francis Adams -- he the son and grandson of American presidents) the "Railroad Problem" had been understood to be because high initial (or *threshold costs)* had to be "sunk" in building a railroad and amortized over time. The classic railroad economists following Adams realized there would be common or shared costs difficult to attribute to specific products the enterprise might want to sell. As important, the economists knew these overhead fixed costs would result in *economies of scale* (declining unit costs with greater output) that to this day give importance to greater *density* of railroad operations.

The public relations disaster for railroads was that *economies of scale and density* meant railroads were so-called *"natural monopolies"* – an often pejorative and misunderstood term implying that railroads had to be regulated to prevent abuses. To be sure, in the days of the "robber barons" the railroads were fully capable of scandalizing their own reputations, but the academic purgatory of the label "natural monopoly" didn't help.

It was an article of conventional economic wisdom that unrestricted natural monopolies would grow in size and economic power until they drove out all competition. Natural monopolies and railroad economies of scale meant mainly one thing to agrarian and Progressive Era politicians in the historical period between the Civil War and the end of World War I – railroads had to be regulated as to rates, services, mergers, issuance of financial securities, and other business practices. Otherwise, if railroads found it to their advantage, they would do such as charge more for short hauls than longer hauls, drive out competitors with predatory rates and practices, water their public stock, discriminate among different customers in the same market, abandon and strand customers that are inconvenient or costly to serve, and discontinue services to out-of-the way places.

On the other hand, the classic transportation economists eventually had to point out that enforcing a *common carrier obligation* to meet all requests for service *regardless of demand levels and operational costs*, and limiting the ability of railroads to recover overhead *sunk costs*, would soon bankrupt railroads. And unless a rail firm were folded into a larger railroad company with a corporate merger, a bankrupt railroad (or simply one enduring under the curse of stranded, underutilized assets), unlucky railroads may not even be allowed to exit the industry.

Before the regulatory reforms of the late 1970s, railroads were required to operate services below cost in the face of publicly subsidized competition – holding their rates high so that favored industries could benefit from use of subsidized rival modes operating under the rail rate umbrella. Rail rates themselves were developed in secret cartel-like meetings of regional "rate-bureau" members, following often uneconomic precedents, arbitrary rules, and unfair voting schemes. Approvals of final rate schedules were subject to adversary proceedings and challenges, and unpredictable general (across-the-board) adjustments or limitations.

Of course this system was not sustainable, but its political supporters (and the regulatory regime under which it operated) held on to rigid administrative regulation as long as possible. It took outside reformers – mainly staffers in the Department of Transportation, a few enlightened shippers and their allies on Capitol Hill, new leadership at the ICC, and comprehensive reform legislation to overturn the old order. The Staggers Rail Act replaced the old rigid rate patterns –with flexible rates set in public gatherings limited to market participants. And the Staggers Rail Act opened the door to its most lasting and innovative rate-making outcome, ***long term private contracts for rates and services*** negotiated between carriers and shippers under the discipline of market forces.

Creation of the Surface Transportation Board (STB)

The sunset of the ICC, which had been established in 1887, occurred on December 31, 1995, under the provisions of the ICC Termination Act of 1995 (ICCTA). In its place, the STB was established on January 1, 1996, as a decisionally independent, bipartisan, adjudicatory body, with jurisdiction over certain surface transportation economic regulatory matters. The 1995 legislation provided for the STB to be housed organizationally within the Department of Transportation for administrative simplicity and efficiency, but that status never set well with STB Board Members. The ICCTA also eliminated various functions previously performed by the ICC; transferred licensing and certain non-licensing motor carrier functions to the Federal Motor Carrier Safety Administration within DOT; and transferred remaining rail and non-rail functions to the STB. Passage of this legislation represented a further step in the process of streamlining and reforming the Federal economic regulatory oversight of the railroad, trucking, and bus industries that was initiated in the late 1970's and early 1980's.

The STB adjudicates disputes and regulates interstate surface transportation through various laws pertaining to the different modes of surface transportation. In this regard, the STB's general responsibilities include the oversight of firms engaged in transportation in interstate and in foreign commerce to the extent that it takes place within the United States, or between or among points in the contiguous United States and points in Alaska, Hawaii, or U.S. territories or possessions. Surface transportation matters under the STB's jurisdiction in general include railroad rate and service issues, railroad restructuring transactions (mergers, line sales, line construction, and line abandonments) and labor matters related thereto; certain trucking company, moving van, and non-contiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and certain pipeline matters not regulated by the Federal Energy Regulatory Commission.

In the performance of its functions, the STB is charged with promoting, where appropriate, substantive and procedural regulatory reform in the economic regulation of surface transportation, and with providing an efficient and effective forum for the resolution of disputes. Through the granting of exemptions from regulations where warranted, the streamlining of its decisional process and the regulations applicable thereto, and the consistent and fair application of legal and equitable principles, the STB seeks to facilitate commerce by providing an effective forum for efficient dispute resolution and facilitation of appropriate market-based business transactions. The STB continues to strive to develop, through rulemakings and case disposition, new and better ways to analyze unique and complex problems, to reach fully justified decisions more quickly, to reduce the costs associated with regulatory oversight, and to encourage private-sector negotiations and resolutions to problems where appropriate.

By nearly all accounts, the STB has become an exemplary agency in its area of expertise, and it is regularly listed as one of the best federal agencies for which to work.

How DOT Battled DOJ on Behalf of Citizens

Jeffrey N. Shane

The launching of the Department of Transportation in 1967 engendered a number of remarkable episodes in the annals of government. One that has been lost to history is the new Department's enlightened policy regarding the defense of lawsuits brought against it by citizens – a policy so enlightened that it was rejected out of hand by the Department of Justice. But it speaks volumes about the idealism of the new Department's leaders and their determination to overhaul America's transportation programs in a way that made them fully responsive to the public interest. At the risk of using a shopworn cliché, I think of these early years as DOT's Camelot period.

A principal objective of the Department of Transportation Act was to bring previously independent or quasi-independent mode-specific agencies under one roof in order to foster a more coordinated transportation system.

Coordination wasn't the only statutory objective in the act, however. The legislation was characterized by a powerful emphasis on ensuring that transportation developments were pursued in an environmentally responsible way. There was also to be a newfound attention to citizen concerns regarding the location, design, and overall quality of transportation projects. Thus, for example, in 1968 the Federal Highway Administration adopted a new two-hearing procedure for the planning of new highways where only a single hearing had been required before. Now there would be a hearing on the basic right-of-way and alignment; a second hearing would be held in order to get public input on the design of the facility.

Section 4(f) of the Department of Transportation Act prohibited the approval of any transportation project or program that required the use of publicly owned land from a "public park, recreation area, or wildlife and waterfowl refuge" of "national, State, or local significance," or "any land from an historic site" unless supported by a finding that there was "no feasible and prudent alternative" to the use of the land and that, if not, that the project included "all possible planning to minimize harm." DOT's first Secretary, Alan Boyd, reserved all decisions that required a Section 4(f) finding to himself and made each one personally.

Sensing that the new Department was attempting to make important adjustments in the conduct of America's transportation programs and encouraged by the inclusion of strong environmental language in the DOT Act, citizen groups began to understand that they had been gifted with a new franchise. They now had more leverage that ever to affect the quality of transportation planning and construction in their communities. Noting a predictable gap between the statutory language and the government's performance, they began suing the Department with greater frequency to enforce Congress's perceived intent. A great many cases were filed charging the Department and/or its modal administrations with a failure to observe fully their new statutory obligations.

When an executive department of the federal government is sued, the Department of Justice (DOJ) is typically responsible for defending it. At DOT, the General Counsel's office through its Office of Litigation was responsible for managing the cases and liaising with the appropriate division at DOJ regarding the conduct of the defense.

Given the reforms that the Office of the Secretary (OST) was attempting to mount under Secretary Boyd, it was OST's view that some of this litigation was potentially helpful. Where program managers were resisting change and even arguing that nothing in the law required it, for example, a well-reasoned judicial decision might actually support the more responsive approach contemplated in the law and advocated by the Secretary.

But there was a problem: The Department of Justice had a long-established policy of fighting citizen lawsuits against the government with a long litany of purely technical and procedural defenses. The lawsuit, Justice would plead, is premature because the agency's decision isn't final, or it is late because the decision *is* final. Or the decision is subject to the agency's sole discretion and thus non-reviewable, or the plaintiffs don't have standing to sue, or the court doesn't have jurisdiction, etc.

I attended a meeting in 1969 between Stanford G. Ross, DOT's second General Counsel (after John Robson, the first, had been elevated to Under Secretary), and Edwin L. Weisl, Jr., Assistant Attorney General in charge of DOJ's Civil Division. DOT had asked the Civil Division repeatedly to stop raising technical defenses in cases in which citizens were challenging decisions made by the Department's modal administrations, but the Civil Division had routinely ignored the requests. Pressed on the point by DOT's Ross, Weisl said DOJ routinely raised technical defenses in cases involving *every* agency of the government; if they didn't raise them in cases involving DOT, it would weaken their defenses in all the other cases. I recall Ross getting increasingly heated, arguing that we were the client and that a lawyer should listen to his client's instruction. Weisl saw things very differently. There was no resolution.

DOT's position was summed up comprehensively in a letter dated March 4, 1969, by Peter S. Craig, DOT's Assistant General Counsel for Litigation, to Glen E. Taylor, Acting Assistant Attorney General in charge of DOJ's Land and Natural Resources Division – the unit that defended government agencies in environmental cases. The letter enclosed a sheaf of letters and memoranda that DOT had sent to the Civil Division in its effort to persuade DOJ not to raise technical defenses. It said:

> Our position is that these defenses do not serve DOT's best interests. First, recognition that administrative decisions may be subject to judicial review helps to insure that operating officials in the Department's many administrations will follow the guidelines set forth in relevant statutes, regulations, and internal orders. This is a valuable aid in running a Department of over 100,000 employees. Second, the courts have been expressing an apparent distaste for technical bars to judicial review of administrative action. The result has been that the assertion of procedural defenses – especially if successful in the first instance and unsuccessful on appeal – serves only to prolong litigation and delay Departmental programs. Finally, we believe that the liberalization of rules governing access to the courts is a healthy trend. In the majority of cases, because the scope of judicial review of administrative decision is quite narrow, the time required for a court to dispose of a complaint on the merits would be no longer than that required to litigate a motion to dismiss on technical grounds. The only difference would be that a party allegedly aggrieved by administrative action would have his day in court. The system, by becoming more responsive to dissatisfied citizens, is to that extent enhanced.

It was ultimately a quixotic campaign. DOJ never stopped throwing technical defenses at citizen plaintiffs. Thanks, however, to an increasingly activist judiciary – particularly with the passage of the National Environmental Policy Act in 1970 – more and more cases were decided on the merits, and program administration throughout DOT's modal administrations improved.

And it is probably fair to say that no agency of government has since pleaded with DOJ to be less aggressive in defending it against those importunate citizens.

Selling The Alaska Railroad to the State of Alaska

Steven R. Ditmeyer

Early in the 20th century, several private companies tried to construct and operate a railroad in Alaska, but they all went bankrupt. US President William Howard Taft in 1912 authorized a commission to survey a railroad between Seward and Fairbanks. The Alaska Railroad was completed when President Warren Harding drove the golden spike at Nenana on July 15, 1923, and it became a part of the US Department of the Interior (USDOI). There it remained until it was transferred to the Federal Railroad Administration (FRA) in the newly created US Department of Transportation (USDOT) on April 1, 1967. In both the USDOI and USDOT, The Alaska Railroad was simply a part of a government agency; it was not a government-owned corporation, and its employees were Federal civil servants. Starting in 1953, the USDOI and then the FRA recruited general managers for The Alaska Railroad from the ranks of executives on US railroads for term appointments.

When John Sullivan became FRA Administrator in 1977 at the start of the administration of President Jimmy Carter, he decided to reactivate the Management Committee of The Alaska Railroad, which had been moribund for a number of years. The Management Committee, established by an FRA administrative order, served as a board of directors for The Alaska Railroad and to advise the FRA Administrator on matters related to the railroad. It was comprised of the several department heads within FRA: Chief Counsel (Chairman), Associate Administrators for Policy (the position I held), Safety, Programs, R&D, and Administration, and the General Manager of the railroad. William Dorcy had been appointed General Manager in 1975; he had taken a leave of absence from the Missouri-Kansas-Texas (Katy) Railroad to which he planned to return in the early 1980's.

Dorcy's plans were altered when the Ethics in Government Act was enacted in 1978. A provision in the law forbade senior executives in the Federal government from having fiduciary or other relationships with private companies. He had to either to terminate his leave of absence agreement with the Katy, or resign from the position of general manager of The Alaska Railroad. Dorcy weighed his alternatives and elected to resign from The Alaska Railroad effective June 30, 1979.

Administrator Sullivan asked me to serve as acting general manager of the railroad until a permanent general manager could come on board in about three months. Before I moved to Alaska, Sullivan and I paid a courtesy call on Senator Ted Stevens (R-Alaska), who was then the Minority Whip of the US Senate. Stevens made it clear that he was not pleased with the appointment of an FRA political appointee as acting general manager and that he wanted a railroad executive appointed as permanent general manager.

Sullivan asked me to do two things in Alaska. One was to come back with a recommendation on what the FRA and USDOT should do with The Alaska Railroad. The other was to attempt to negotiate contract rates with shippers and file them with the Interstate Commerce Commission (ICC). FRA was, at that time, in the process of drafting legislation to deregulate the freight railroads in the US, and the ability of the railroads to negotiate contract rates was to be a key element of that legislation. (The Staggers Rail Act was passed and signed into law in December 1980.) The ICC had already issued regulations indicating they would be receptive to contract rate proposals, and Sullivan wanted me to test that proposition.

One of the first actions that I did on arriving at the railroad was to ask the railroad's Manager of

Marketing to set up meetings for us with each of the railroad's shippers. I wanted to learn how they perceived the railroad's service, what changes in service they would desire, and what their future projections of traffic were. I also wanted each shipper to know that the railroad wanted its business, and that I recognized that the shipper and the railroad both needed to cover their costs and earn a profit in order for the commodity to be transported on the railroad. The visits were well received, and I frequently received the comment that I was the first general manager of the railroad that had ever called on them.

In order to carry out Sullivan's first request, I wrote letters to the commanders of the military bases in Alaska – Fort Richardson and Elmendorf Air Force Base at Anchorage and Fort Wainwright and Eielson Air Force Base at Fairbanks – to find out what current and future reliance on the railroad they saw for their bases and whether or not the railroad was essential for their deployment or augmentation plans. They responded in a couple of months that, even though they used The Alaska Railroad for receiving supplies, there were other shipping alternatives available to them, and they were not counting on using the railroad for deployments and troop augmentations. If they needed the railroad for these purposes, they would handle arrangements with the railroad just as the military did with railroads in the Lower 48.

To carry out Sullivan's second request, I let the shipping community know that the railroad was interested in entering into contract rate negotiations. Crowley Maritime, the operator of the "Hydro-Train" rail barge service that connected the port of Whittier on the railroad with the port of Seattle, was particularly interested. Crowley and The Alaska Railroad jointly negotiated contract rates for service between Seattle and Anchorage and Fairbanks with several shippers and filed them with the ICC, which upheld them. These were the first railroad contract rates ever filed with the ICC.

Over the years the State and Federal governments had carried out numerous studies to examine the feasibility of extending the railroad in various directions from its northern terminus at Fairbanks. In the late 1970's, the State's Department of Commerce and Economic Development (DCED) had contracted for a study to look into the extension of the railroad southeast from Fairbanks to the Canadian border, where it would connect with an extension of the British Columbia Railroad (now CN) northwest through Yukon Territory from its terminus at Dease Lake, BC.

The DCED was advocating the extension because it believed that with Anchorage being the closest North American port to the Orient, freight between the Orient and the US Midwest could be attracted to the new line. DCED was very pleased when the consultant's report in mid-summer 1979 said the extension might carry one million tons of freight annually. DCED was not pleased, however, when I told them that, in planning for the restructuring of the bankrupt northeast railroads into Conrail, FRA viewed any existing lines carrying less than two million tons of freight annually as being candidates for abandonment. This was the approximate tonnage that was being carried annually on the main line of The Alaska Railroad.

FRA's Office of Personnel conducted the search for a permanent general manager by placing ads in newspapers, magazines, and the trade press. By mid-July, it appeared that one of the applicants for the job could make a very suitable general manager. He was a relatively young chief engineer for an eastern railroad about the same size as The Alaska Railroad, and he met Senator Stevens' criteria.

Before the candidate could be interviewed, however, there was a major shake-up in President Jimmy Carter's cabinet. On July 20, Carter asked for and received resignations from several of his cabinet officers, including Secretary of Transportation Brock Adams. That put an immediate halt to all personnel actions for senior executives in DOT, including that for the general manager of The Alaska Railroad. I realized immediately that I would probably be staying in Alaska longer than three months.

Neil Goldschmidt was confirmed as the new Secretary of Transportation on August 15, but it took several months for Goldschmidt to get his hands on the "levers of power" in DOT and for personnel actions to begin moving through the system again.

The Alaska Native Claims Settlement Act was enacted in 1971, and provided for the transfer of federal lands and cash to 13 Native Corporations and approximately 200 Village Corporations. In 1979, however, there had been no final determination regarding which federal lands were to be transferred. Several Native Corporations claimed some of The Alaska Railroad's right-of-way, saying the railroad did not need a 100-foot wide right-of-way, as well as railroad owned gravel pits, saying that they were not intrinsically part of railroad operations. Railroad staff, FRA staff in Washington, and I spent quite a bit of time with representatives of the Native Corporations explaining the railroad's need for right-of-way and ballast. Resolution of this issue would not occur for several years.

Even before I arrived in Alaska, I was aware that the railroad was not financially healthy. I went to work trying to get additional business, raise the rates, and cut operating costs. It is difficult to determine with any precision the effect that I had on the financial performance of the railroad; I served as acting general manager for the last three months of FY1979 and the first four months of FY1980. However, the changes I had set in motion resulted in an increase in revenue from $25.2 million in FY1979 to $28.9 million in FY1980, an increase of 14.7%. Expenses increased from $31.5 million in FY1979 to $34.7 million in FY1980, an increase of 10.1%.

As a result, the Operating Ratio (expenses divided by revenues, excluding depreciation) decreased from 121.5 in FY1979 to 115.4 in FY1980. Normally, a decrease in the Operating Ratio of 6.1 points would be highly commendable on a Class I railroad, but only if the Operating Ratio were already well below 100. The fact that the Operating Ratio in FY1980 was still well above 100 indicated to me that The Alaska Railroad did not have long-term going-concern value.

On my return to Washington in February1980 following the selection of the new general manager who had been president of a short line railroad in Colorado, I presented Sullivan with my evaluation of the railroad and my recommendation for its disposition. I had concluded that, even despite the potential of export coal traffic to Korea through the port of Seward, a rational businessperson would not want to acquire the railroad, since it was not likely to earn a profit from rail operations and since there were potential claims on railroad property by Native Corporations under the Alaska Native Claims Settlement Act. The only reason a businessperson would want to acquire the railroad would be to sell its track and rolling stock components for scrap. The economy of Alaska was much like that of an underdeveloped country, based largely on the sale of commodities like coal and oil. While an annual shift of traffic by 10 per cent up or down was considered large for a railroad in the Lower 48, The Alaska Railroad sometimes experienced either a halving or doubling of traffic from one year to the next. I was unable to find any Federal role or mission that the railroad was carrying out.

In drafting the Annual Report for FY1979 for The Alaska Railroad, which was to be formally submitted by the Secretary of Transportation to the President for transmittal to The Congress, I proposed that a paragraph be included that would be in keeping with the Alaska Statehood Act that transferred many Federal properties to the State of Alaska:

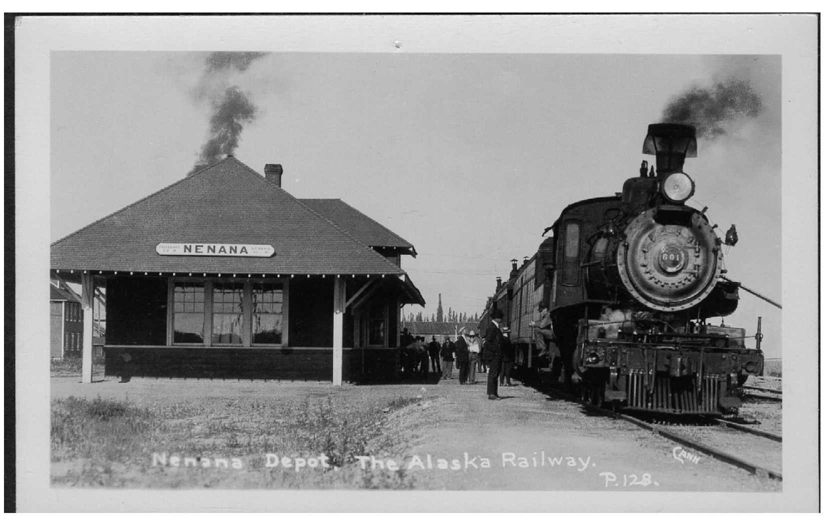
> "The Federal Government believes that ownership of The Alaska Railroad should be transferred to the Government of the State of Alaska. The Federal Government believes that The Alaska Railroad exists primarily for the residents and shippers in Alaska; they need and deserve a much larger voice in determining the role that they want the railroad to play."

The Budget Office in OST, in consultation with OMB, however, rejected the concept of a direct transfer because the State of Alaska had recently announced plans to distribute to all its residents cash dividends from the Alaska Permanent Fund made up of proceeds from oil and gas sales and royalties. OMB felt that Congress would not agree to a transfer of federal property to a state that was distributing cash to its residents. Consequently, the first sentence in the paragraph was changed to read as follows:

> "Since the Government of the State of Alaska has substantial surplus funds because of the growth of oil revenues, the Federal Government believes that ownership of The Alaska Railroad should be with the State Government."

The version of the Annual Report containing this language was approved and sent forward to the President and to The Congress. It set in motion the process that resulted in the enactment of the Alaska Railroad Transfer Act in 1982, the valuation of the railroad at $22.3 million by the United States Railway Association (which previously had done valuations of the bankrupt northeast railroads), the settlement of land claims issues with the Native Corporations, and the sale of the railroad to the State of Alaska in 1985.

When the State wrote its check for $22.3 million to the US Treasury and took control of the railroad, they made it a state-owned corporation called the Alaska Railroad Corporation with a Board of Directors appointed by the state government. The employees worked for the corporation; they were not employees of the State of Alaska.



How Dot Opened The Global Skies[15]

Jeffrey N. Shane

Introduction

In 1944, representatives of 54 countries came together at the Stevens Hotel in Chicago—today's Chicago Hilton—and forged a treaty that would become the foundation for the future of international civil aviation. Known appropriately enough as the Chicago Convention,[16] it was designed to establish global consistency in governments' treatment of air transport. Standards were set for national regulation of aviation safety, aircraft registration, taxation, and other exigencies of international airline operation, all of which enabled the dramatic expansion in international flying that occurred during the post-war era.

As important as the treaty was, it failed to address a vitally important issue: market access. It set the rules that would govern flying across national boundaries, but whether a particular airline was actually *allowed* to cross a particular national boundary was left to the governments in question to decide. How many airlines, how many flights, which cities they could serve, which intermediate and onward stops they could make, what prices they could charge – all these issues would be for future negotiators to work out. The United States had proposed a multilateral agreement guaranteeing commercial landing rights everywhere to all of the world's airlines without restriction, but it didn't sell. A number of other proposals also fell on deaf ears. Thus, the establishment of commercial traffic rights henceforth would be a matter to be negotiated by governments on a market-by-market basis.

It was a fateful decision. By failing to establish an open global marketplace for international airline operations, the Chicago conference by implication created a closed market. Three hundred years after the Dutch jurist Hugo Grotius had written that the seas were open to everyone and that ships could call at any port in the world regardless of their flag, the world's aviation powers gathered in Chicago had established precisely the opposite principle. Aviation, now as vital to global commerce as shipping, would be shackled by a host of restrictions – explicitly enshrined in government agreements -- that would have been deemed illegal trade barriers in any other sector of economic activity. Airlines would not be allowed to fly between any two countries without first obtaining explicit permission from both. That permission would be granted, route by route, carrier by carrier, pursuant to carefully calibrated, highly mercantilist bilateral accords that would compromise the growth of aviation and limit its potential benefits for years to come.

As explained more fully in the account that follows, the U.S. government began moving global aviation policy in a new direction beginning in 1977 at the behest of President Carter. Fifteen years later, under President George H. W. Bush, the United States pioneered a new "Open Skies" approach to international aviation in a groundbreaking new agreement with the Netherlands – the first of 120 Open Skies agreements that the United States enjoys as of this writing. Increasingly, governments everywhere are backing away from their earlier micromanagement of international aviation, allowing carriers to tap market opportunities where they can be found far more easily and responsively.

[15] Portions of this article are based on a presentation (the "Assad Kotaite Lecture") by the author to the Royal Aeronautical Society (Montreal Branch) on Dec. 8, 2005, available at http://tinyurl.com/mljr5e3.

[16] Convention on International Civil Aviation, opened for signature Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S 295. It superseded the Convention relating to the Regulation of Aerial Navigation (or Paris Convention) adopted at Paris on Oct. 13, 1919, and the Pan American Convention on Commercial Aviation (or Havana Convention), adopted at Havana on February 20, 1928.

The benefits to peoples and economies around the world have been incalculable.

This is the story of that vitally important policy transformation, and of how, against all odds, the political courage of two Secretaries of Transportation made it happen.

Domestic Deregulation in the US

Unquestionably, the liberalization of international aviation would not have been possible had the United States not first demonstrated the benefits to consumers in its *domestic* market of allowing the quality and price of air transportation to be determined by competition rather than regulation. Deregulating the domestic U.S. market, however, didn't come easily.

In 1975, the Subcommittee on Administrative Practice and Procedure of the United States Senate, chaired by Senator Ted Kennedy, launched public hearings on whether the Civil Aeronautics Board's regulation of airline routes, rates, and services was still delivering value to the public.

On the first day of the hearings, the Acting Secretary of Transportation, John W. Barnum,[17] announced that the Ford Administration had developed a major proposal for reform of the CAB and its functions. The present structure of regulation, he said, was "outdated, inequitable, inefficient, uneconomical, and sadly irrational."[18]

Just a few months later, the CAB itself made a surprising announcement. Led by a bold new chairman, John Robson,[19] the Board proposed to launch a series of experiments "to assess the operation of the U.S. domestic air transport system under limited or no regulatory constraints."[20] The Board would establish "zones of reasonableness" within which airlines would have the freedom to raise or lower their fares without regulatory interference, and would allow carriers the freedom to enter or exit selected markets at will, without prior CAB approval.

The experiments were launched, but the Senate hearings continued. They were highly contentious, and they made the subject of airline regulation a highly visible, national issue for the first time. The proponents and opponents of continued economic regulation of the airline industry came out in force, and their differences stood out in sharp relief. Because the most conspicuous proponents of regulation were the airlines themselves, and because they were occasionally overheard vilifying the advocates of change, the hearings made for great theater.[21]

They also made for a demonstration of the American legislative process at its best. The airline proponents of continued regulation were far better organized and politically powerful than the opponents.[22] And yet, in 1977, Congress passed a law deregulating all-cargo air services.[23] It

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[17] John W. Barnum had earlier served as DOT's General Counsel (1970-73), Under Secretary of Transportation (1973-74), and Acting Secretary and Deputy Secretary of Transportation (1974-77).

[18] Stephen Breyer, *Regulation and its Reform* (1982), at 329.

[19] John Robson had served as DOT's first General Counsel (1967-68) following which he was promoted to Under Secretary of Transportation (1968-69).

[20] "CAB Suggests Experimental Program to Test Consequences of Deregulation," Civil Aeronautics Board Press Release, July 7, 1975.

[21] See generally Thomas Petzinger, Jr., *Hard Landing* (1995), at 86-105; Breyer, fn. 1, at 317-340.

[22] "[P]rior to the Kennedy hearings the conventional wisdom was that those who might lose through deregulation – the airlines, the unions of airline workers, and certain business travelers – would know of their potential losses and strongly oppose change, while the potential gainers, primarily nonbusiness travelers, would neither know nor care enough to overcome their opposition. This analysis proved faulty primarily because it overlooked the potential of [making the issue visible through the hearing process]." Breyer, fn.1, at 321.

[23] Public Law 95-163 91 Stat. 1278 (Nov. 9, 1977). The Ford Administration was lukewarm on air cargo deregulation based on opposition from incumbent all-cargo airlines. Speaking two decades later to the International Bar Association in Vancouver, John Barnum said: "I had to hedge the Administration's position on cargo deregulation because, at the Madison Hotel in Washington the night before [a House hearing on the air cargo deregulation bill], I had not been able to persuade Joe Healey and Wayne Hoffman of Flying Tigers,

passed the Airline Deregulation Act,[24] covering all domestic commercial aviation, a year later. Against all odds, the public interest had prevailed, and a once radical idea was enshrined in U.S. law.

Spreading Liberalization to International Aviation

Shortly after coming into office in 1977, while promoting domestic deregulation, the Carter Administration also began to re-examine the traditional approach to *international* aviation regulation, including what it perceived to be an excessively protectionist bilateral negotiating process. The closed market created by the Chicago Convention, the Carter Administration believed, needed to be opened up more robustly than traditional bilateral arrangements allowed. On October 6, 1977, President Carter sent an important letter to Secretary of Transportation Brock Adams. It said that the "central goal in international aviation should be to move toward a truly competitive system. Market forces should be the main determiner of the variety, quality, and price of air service…." The letter went on to direct the Department of Transportation to pursue a fresh approach to the negotiating process:

> We should seek international aviation agreements that permit low fare innovations and scheduled service, expanded and liberalized charter operations, nonstop international service, and competition among multiple U.S. carriers and markets of sufficient size. We should also avoid government restrictions on airline capacity. For keeping in mind the importance of a healthy US flag carrier industry, we should be bold in granting liberal and expanded access to foreign carriers in the United States in exchange for equally valuable benefits we receive from those countries. Our policy should be to trade opportunities rather than restrictions.[25]

It is difficult to appreciate, in this era of ubiquitous Open Skies agreements, the magnitude of the change reflected in those words. Only a year before, the Ford Administration, while generally supporting the deregulation of domestic aviation, had nevertheless issued a policy statement embracing a far more traditional approach to international aviation. Orderly markets and meticulously calibrated, reciprocal exchanges of rights had been the most important U.S. objectives – "trading restrictions" -- not innovation and competition.[26]

With their new marching orders from President Carter, U.S. aviation negotiators began the quest for liberal bilateral agreements – offering the airlines of other countries expanded but not unlimited new access to the U.S. market – including new interior gateways -- in return for provisions guaranteeing open entry, freedom to set fares and schedules, liberal charter rules, and other elements of greater commercial freedom.

In 1978, the CAB decided it was time to require price competition among international airlines, and it proposed to do so by administrative fiat. For more than three decades, international air fares had been established by government-sanctioned airline agreements conducted under the auspices of the International Air Transport Association. Fares agreed at those conferences would be presented to

then the largest all cargo air carrier, that air cargo deregulation was in their interest. Because of the very short notice of the hearings, I had been authorized to promote all cargo deregulation at the hearing only if I could get politically powerful Flying Tigers on board." Available at https://shar.es/1QCNVM.

[24] Public Law 95-504, 92 Stat. 1705 (Oct. 24, 1978).

[25] Quoted in International Economic Policy Association, "Aviation Services in America's International Trade: A Review Under Open Skies" (December 1981), at 16.

[26] The White House, "International Air Transportation Policy of the United States" (September 1976). For example, while maintaining that a "basic tenet of US economic philosophy is that market-place competition produces improved services and lower total costs for the consumer," the statement said: "However, it does not follow that there must be multiple US flag carriers on all international routes." *Id*. at 9.

governments for approval or disapproval. The CAB proposed now to terminate the antitrust immunity that IATA's fare-setting machinery had enjoyed for the previous 33 years, thereby putting an end to the legalized cartel once and for all.[27] There had been no prior consultation with the Departments of State or Transportation prior to the announcement, let alone with America's trading partners.

Liberalization Criticized Everywhere

Thanks to these initiatives of the Carter Administration and the CAB, the United States became highly unpopular throughout the global aviation community. The CAB's IATA proposal was delivered in what many observers thought was the most offensive possible way: as an "order to show cause" why the Board should *not* terminate the immunity. It looked to most observers like a *fait accompli*, and it was immediately denounced everywhere as an egregious example of U.S. unilateralism – single-handedly calling into question the established global framework for a seamlessly connected and convenient international aviation system. The Department of State organized a number of regional meetings with governments around the world in an effort to lower the temperature of the issue.

Even the offer of greater access to a few more U.S. gateways as payment for liberalization was resented by many of America's trading partners. It was seen as an effort to leverage the attractiveness of the American air travel market as a means of ramming American aviation policy down the throats of unwilling governments.

As I recall it, there was an abiding nastiness and tension about much of what we were doing in aviation policy at that time. My own first exposure to all of this was in 1979, when I joined – more accurately, *re*joined -- the Department of Transportation as an assistant general counsel. (I'd been there earlier, between 1968 and 1972, as a trial attorney and special assistant to the General Counsel.) Shortly after arriving at my new job I was invited to sit in on a round of aviation talks in Washington between the U.S. and Canada. I will confess now that, while I did my best to keep a knowing and intelligent look on my face, I had not the slightest idea what the two chairmen were talking about. All I knew was that they were furious at each other and florid-faced. I wondered what I had gotten myself into.

The nastiness was by no means confined to relations with our trading partners. The established U.S. international airlines – primarily Pan Am, TWA, Northwest, Braniff, and Flying Tiger – found nothing to like in their government's newfound determination to inject meaningful competition into international markets that had long been their private preserve. They knew that the real threat would not come from foreign airlines but rather from home, where deregulation was quickly spawning a new generation of highly efficient and aggressive carriers whose international flights – once they were permitted – would be fed by huge and efficient domestic route networks. From the outset, therefore, the "incumbent airlines," as they were called, were hostile to the entire enterprise.

Even views within the U.S. government itself were by no means homogeneous. Everyone knew and agreed what the core principles of our policy were; the President had told us. Ways and means were an entirely different matter, however. Every round of aviation talks was preceded by one or more meetings among the agencies during which U.S. objectives for that particular bilateral aviation relationship were defined. What pace of change would we insist upon? How much compromise would we accept? Would we continue to protect particular gateways at the behest of U.S. incumbents? The meetings were long and often unpleasant. And while the U.S. tried to maintain the appearance of unity in response to the avalanche

[27] CAB Docket 32851, Order 78-6-78, June 9, 1978.

of criticism that greeted the CAB's so-called "show cause order" on IATA's tariff agreements, the truth was that the Departments of State and Transportation were highly critical of the CAB's action.

Still, despite all of the internal and external rancor, the Carter Administration negotiated a number of important bilateral breakthroughs. New, liberalized agreements with trading partners in Europe, the Middle East, and Asia established an important new model for international aviation relations.

Congressional Oversight of International Aviation Policy

No success, as they say, goes unpunished. Those new agreements galvanized the incumbent U.S. international airlines into action. They complained bitterly to Congress that Uncle Sam was giving away "hard rights" – new U.S. gateways for the benefit of foreign airlines – in return for "soft rights" – nothing more than the willingness of foreign governments to stop regulating entry, fares, and schedules. The U.S. government's worst failing, they said, was its ineffectiveness in responding to the discrimination and other obstacles to full market participation that they routinely encountered in their overseas operations.

In late 1979, Congress passed a new law – the International Air Transportation Competition Act – and spelled out a number of objectives "to guide the United States Government in establishing a negotiating policy for international aviation."[28] While the legislation confirmed the basic elements of the Carter Administration's procompetitive aviation policy, it placed a new and greater emphasis on the consequences of liberal aviation agreements for U.S. carriers. Among the goals for international aviation policy from this point forward, the Congress wrote, was –

> the strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers, including the attainment of opportunities for United States air carriers to maintain and increase their profitability, in foreign air transportation.[29]

A particularly important provision said that it was permissible for U.S. negotiators to offer opportunities for carriers of foreign countries to increase their access to United States points, but only "if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given away."[30]

Finally, the legislation made clear that U.S. negotiators should place greater emphasis on eradicating discrimination and other barriers to doing business as a major objective of U.S. aviation policy.[31] All in all, it looked as though the incumbent U.S. international carriers had been highly successful in persuading Congress to recalibrate U.S. aviation negotiating policy in a way favorable to their position.

They weren't satisfied, however. Another year went by and Ronald Reagan was elected President. As the new Reagan Administration settled in, the incumbents launched a renewed, two-pronged assault on liberalization. First, they submitted a "white paper" to the incoming Administration denouncing the excesses of the Carter Administration's aviation policy, and bolstered it with an economic study purporting to demonstrate what a catastrophe that policy had been for U.S. carriers. "[O]n an overall basis," the study said, "the United States is worse off today in market

[28] H.R. Rept. No. 96-602, 96th Cong., 1st Sess. (1979), at 6.

[29] Pub. L. No. 96-192, § 17(e)(1) (1980), now codified at 49 U.S.C. § 40101(e)(1).

[30] *Id.*, § 17(e)(8), now codified at 49 U.S.C. § 40101(e)(8).

[31] *Id.*, § 17(e)(9), now codified at 49 U.S.C. § 40101(e)(9).

shares than at any time in the last decade."[32] In response to the white paper and study, the Reagan Administration instituted a moratorium on further negotiations that lasted several months.

The campaign was by no means confined to the Executive Branch. At the same time, they were complaining to the Reagan Administration, the incumbents were also renewing their complaints to Congress. As a result, nine separate hearings on aviation policy were conducted by the House Subcommittee on Investigations and Oversight within a ten-month period – from July 1981 to May 1982. The Subcommittee, led by Congressman Elliott Levitas (D-GA), issued its conclusions in a document that became known as the "Levitas Report."[33]

After paying the usual lip service to the importance of allowing consumers to benefit from competition, the report roundly denounced the performance of the government agencies responsible for aviation policy. "Our carriers' economic viability has been adversely affected," the Subcommittee said, "by an Open Skies policy which has extended domestic deregulation to the international arena." "Our agencies," it continued, ". . . have not forcefully negotiated bilateral agreements that support our air industry…." The nearest thing to a compliment in the report was a single sentence:

The Subcommittee is pleased to have noted that the attitude of U.S. negotiators at bilateral conferences seemed to have hardened since the beginning of our hearings in July 1981 in that they don't seem to give away rights for the sake of having a treaty.[34]

[32] "Aviation Services in America's International Trade: A Review Under Open Skies," International Economic Policy Association (December 1981), at 23.

[33] H.R. Rept. No. 98-19, 98th Cong., 1st Sess. (1983).

[34] *Id*. at 7.

Quiet and Consolidation

The story thus far should make it abundantly clear that there is nothing easy about liberalizing aviation markets. For the next several years, the U.S., chastened by the violent objections of some of its most important airlines and their congressional champions, was less aggressive in the pursuit of liberal agreements. An important multilateral agreement in 1981 between the U.S. and the individual aeronautical authorities that comprise the European Civil Aviation Conference introduced greater pricing flexibility into the trans-Atlantic aviation market, and the CAB cited that agreement as justification for postponing its decision to terminate IATA tariff coordination on four separate occasions.[35]

The proceeding was finally terminated in 1985.[36] In the main, however, U.S. negotiators focused less on grand reforms than on individual, market-specific issues: the elimination of ground-handling monopolies; reducing excessive airport fees; securing market access for computer reservation systems; ensuring that United Airlines was permitted to succeed Pan Am on routes to Asia that it purchased in 1985; obtaining new market access opportunities in Japan, China, India, Canada, and elsewhere; and so on.

While the rest of the 1980s was a period of relative quiet in U.S. international aviation relations, the U.S. airlines began exploiting more effectively the broad new freedoms that had been delivered – sometimes over their own vehement objections -- in the earlier liberal bilateral agreements.

[35] CAB Docket 32851, Orders 81-5-27, May 6, 1981; 81-9-68, September 15, 1981; 82-1-31, January 7, 1982; 82-3-77, March 15, 1982. The agreement was finally terminated by the Department of Transportation in 1985, following the CAB's "sunset" at the end of 1984. DOT Docket 32851, Order 85-5-32, May 10, 1985.

[36] DOT Docket 32851, Order 85-5-32, May 10, 1985. (The Department of Transportation succeeded to the international aviation responsibilities of the CAB after the Board's "sunset" at the end of 1984.)

In fact, the performance of U.S. airlines in international markets during the 1980s was extraordinary. They carried nearly twice the number of passengers in 1990 as in 1980; their market share grew by about 20 percent; revenues attributable to international operations more than doubled; and the percentage contribution of international services to their overall system-wide revenues increased by about 20 percent. [37]

Consumers and communities benefited in even more dramatic ways. In 1980 there had been 17 U.S. gateways with nonstop services to Europe; by 1990 that number had increased to 25. The number of nonstop routes across the North Atlantic – city-pairs with nonstop service – grew from 92 to 1980 to 161 in 1990. Similarly dramatic increases were seen in the number of gateways and nonstop routes to the Asia/Pacific region and to Latin America. Passenger growth was consistently stronger in liberalized markets than in non-liberalized markets. Cargo carried by U.S. airlines more than doubled between 1980 and 1990.[38]

Open Skies: Broadening the Definition

The policy had been a success – at least as far as it went. But it didn't go far enough. Even our most liberal bilateral agreements still contained major restrictions on the operation of airlines – both U.S. and foreign -- in international markets. Many of those restrictions had been maintained for the protection of U.S. airlines, particularly after the Congressional criticism of the late 1970s and early 1980s. In many cases, they prevented foreign airlines from bringing international service to U.S. communities that badly wanted it. The foreign airlines were often unwilling to seek an exchange of rights to facilitate that new service because the exchange would merely increase the competitive advantage they felt U.S. carriers already enjoyed.

[37] Unpublished DOT study, December 1992.

[38] *Ibid*.

The problem was particularly intractable when no U.S. airline was seeking new opportunities in its service to a foreign airline's home country. The conventional wisdom – that U.S. bilateral aviation agreements needed something close to mirror-image reciprocity – meant that there was no easy way to deliver new international services that foreign airlines were proffering to U.S. cities that badly wanted it. Instead, our answer was likely to be "not now." We would wait until some U.S. carrier needed comparable new rights, at which point an exchange would be discussed. Because we now had so many liberal agreements that already delivered everything that U.S. carriers were likely to need in terms of market access, however, there was no longer anything to wait for. When we asked ourselves what value such restrictions brought to the U.S. economy, we found we had no good answer. In fact, it was clear that the restrictions actually reduced the value of our agreements by limiting competition unnecessarily.

I had moved from DOT to the Department of State in 1985 to become Deputy Assistant Secretary for Transportation Affairs. Among other responsibilities, I served in that job as chief U.S. aviation negotiator. This conundrum – being the victim of our own success –quickly became a source of real frustration, particularly when I was invited to address local chambers of commerce in cities around the U.S. that were seeking valuable new international air services. I had to explain to them in too many cases why Uncle Sam wasn't helping. The message wasn't well received. Concluding that the best defense might be a good offense, I started making speeches delicately suggesting to civic groups around the country that it was time to get better organized and to help provide more visible support in Washington for the more community-friendly aviation policy that they needed.

In 1988 I was invited to deliver luncheon speech to the Wings Club in New York, an old and venerable social club for aviation aficionados. The event would be well covered in the aviation press, and so I thought it might be a good opportunity to point out the counterproductive consequences of our negotiating stance. Not sure whether my superiors would be comfortable with shining a spotlight on the deficiencies in our established policy, I decided not to seek any formal clearance for my remarks.

"For all of its near-term benefits to our airline industry," I told the gathering, "the bilateral negotiating system may not be serving the larger public interest nearly as well. The big losers in the picture, of course, are air travelers and shippers, and U.S. cities that seek new direct air service to foreign points – service that foreign airlines want to provide but cannot because their aspirations for new service are not matched by those of the U.S. carriers."

"An anachronistic, highly regulatory system of bilateral agreements," I continued, "has actually worked to the advantage of the U.S. airline industry to such an extent that we are beginning to deny ourselves the widely acknowledged benefits of an expanding, dynamic international air transport market."

I returned to Washington wondering what sort of reaction my truth-telling would receive. I didn't have to wait long. Walking down one of the long hallways in the State Department's Foggy Bottom headquarters a few days later, I saw my boss, Assistant Secretary for Economic and Business Affairs Julius ("Jules") Katz coming in the opposite direction. I had sent him my Wings Club speech after the fact and I was sure he'd read it. He was looking at a document as he walked but I knew he'd seen me. I held my breath as the distance between us closed. As he passed me he looked up, said, "Good speech," and kept on walking. I rounded a corner and leaned back against the wall breathing a huge sigh of relief. If Jules Katz liked the speech, skepticism about the traditional approach to aviation negotiations could now be treated as official State Department policy. No less important, I would still have a job.

I moved back to DOT from State in 1989 after receiving my first Presidential appointment – as Assistant Secretary of Transportation for Policy and International Affairs in the administration of President George H. W. Bush. The position covered the entire range of transportation policy, domestic and international, which meant that international aviation policy was still part of my portfolio. I found in my new boss, Secretary of Transportation Samuel K. Skinner, a clear-eyed, courageous, politically adroit decision-maker who had come to Washington (from Chicago) to make a difference.

In 1989, concerned about what often seemed like a pointless denial of international air service to U.S. cities that needed it, Secretary Skinner proposed a new "unserved cities program." The idea was simple: If a foreign airline wished to fly to a U.S. city that no U.S. airline was serving, and that foreign airline was based in a country that had entered into a liberalized aviation agreement with the U.S., we would permit the new service without the need for a new negotiation. DOT decided, in other words, not to let the traditional bilateral negotiating process stand in the way of beneficial air service without a good reason.

It sounded simple enough, but Secretary Skinner knew the program represented a dramatic departure. We needed to ask ourselves whether the initiative fully respected the requirements set forth in the International Air Transportation Competition Act of 1980 – most importantly that foreign carriers could be granted new opportunities to serve the U.S. *only* "if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given away." Yet here we were, proposing to award new opportunities to foreign airlines free of charge, without any exchange whatsoever.

The analysis served up to Secretary Skinner concluded that the proposal was indeed consistent with the statutory mandate. By definition, the cases covered by the proposal would be those in which our trading partner literally had nothing more to give. Moreover, the new service would certainly create benefits of similar magnitude for the traveling public. Secretary Skinner fully understood the risk he was taking, but he instructed the staff to finalize the proposal.[39] A number of new services were launched without the need for formal negotiations.

In the meantime, I had been discussing with my State Department counterpart, Eugene McAllister, who had succeeded Jules Katz as Assistant Secretary of State for Economic and Business Affairs, whether we might take the initiative even further. I shared with him my conviction that it was time to break away even more radically from the international aviation policy of the past and found him wholly sympathetic. I took the idea next to Lehman Li, Director of the President's Economic Policy Council; he expressed enthusiasm and asked that we create a White House working group to develop the idea. Once it was clear that the State Department and White house were on board, I drafted a short message to Secretary Skinner proposing that we start working on a major policy initiative to "move the world toward a far more rational approach to international air services."[40]

Typically in government, the best that can be expected from a memo proposing a major departure from existing policy is the establishment of a committee with a mandate to examine the idea, consult with stakeholders, and report back in six months. I sent Secretary Skinner my memo on October 20, 1989 – a Friday – fully anticipating a similar response. It came back to me the following Tuesday – two working days later.

I had been in government for many years and had sent forward a lot of policy proposals. Nothing prepared me for what I saw. In the margin of the memo, Secretary Skinner had written: "Go for it."

We went for it. The unserved cities initiative had demonstrated that we could actually give routes away free of charge to the airlines of liberal trading partners as long as we could defend the exchange on the basis of benefits to the traveling public. Communities and airport operators by this time had become more organized and were aggressively supporting the more flexible interpretation. It wouldn't be a big leap – either conceptually or politically -- to the next obvious step: launching a new Open Skies approach to international air services that allowed airlines to fly wherever they found a commercial opportunity.

Secretary Skinner embraced the idea enthusiastically, but by the time it was ready to be proposed in a formal DOT order, he had moved to the White House as Chief of Staff. He was replaced at DOT by President Bush's former Deputy Chief of Staff, Andrew H. Card, Jr. There was no transportation policy-making in Secretary Card's background, but he was a very quick study. Even more impressive, I thought, was the clarity of analysis he brought to the decisions he was faced with. Like those of his predecessor, his actions were consistently informed by his sense of what the public interest required. Moreover, his years in the White House had seasoned him; he was fearless when making decisions he knew would be controversial.

With Secretary Card's blessing, the new Open Skies policy was adopted in August 1992.[41] It was even simpler than the unserved cities program:

[39] DOT Docket 46534, Order 90-1-62, Jan. 30, 1990, modified by Order 91-11-26, Nov. 20, 1991.

[40] A copy of the memo went to the Deputy Secretary of Transportation--and at this writing Secretary-- Elaine L. Chao. The memo is reproduced in the Appendix.

[41] DOT Docket 48130, Order 92-8-13, Aug. 5, 1992.

The airlines of countries that agreed to open their air services markets to U.S. carriers – regardless of their size or the number of airports they had -- would receive, in return, open access to and through the United States.

It didn't unfold exactly as expected, however. My initial memo to Secretary Skinner had anticipated early agreements with a "critical mass" of important European states – France, Germany, Italy, and the U.K. – and noted that, by happy coincidence, aviation talks with all four countries were already on the calendar. We needed that critical mass, I believed. "No one partner, by itself," I had written, "can offer us enough in the way of new opportunities to justify any major movement on our part." The memo even suggested the possibility of a "scramble" within Europe to join us in the new vision, thereby ending with a stroke the worrying prospect of a "fortress Europe" – increased resistance among European states to the expansion of U.S. airline services once a single European market for aviation was established.

In the end, my predictions turned out to be utter nonsense. None of the major aviation partners we spoke to had the slightest interest in forging closer aviation ties with the U.S. on the eve of the Single Market and what they hoped would be a much stronger bargaining position. So much for the "scramble."

Predictably, the only country that expressed interest in the new policy was the Netherlands. Given the importance of unfettered global trade to their history and prosperity, the Dutch had consistently championed aviation liberalization. The problem was that the Netherlands had a very small indigenous air travel market compared to the U.S. While KLM's flights to the U.S. were often full, a great many of the passengers came from other countries on flights that connected at Amsterdam. An Open Skies agreement with the Netherlands thus would allow KLM to "poach" even more passengers traveling from other countries to the U.S. Moreover, U.S. airlines already enjoyed virtually unlimited access to Amsterdam by virtue of the already liberal U.S.-Dutch aviation agreement; they would get no new market access whatsoever from any new agreement with the Netherlands.

In short, the Netherlands was the classic example of a partner that, by itself, could not "offer us enough in the way of new opportunities" to justify the major shift in policy we were contemplating. In terms of the political optics, it would have been difficult to imagine a less attractive candidate for America's first Open Skies agreement.

Whether to proceed with the agreement given its obvious downsides would have to be decided by Secretary Andy Card. It was clear that, by the usual calculus, it would be a seriously lopsided accord; KLM would get access to the huge landmass of the United States and beyond to anywhere in the world, while U.S. carriers would get nothing that they didn't already have. The criticism from the U.S. airline industry was likely to be withering – directed at Secretary Card personally and even at the President, who was struggling in a difficult re-election campaign.

Following careful deliberations, Secretary Card, determined to move policy in a more rational direction, gave the green light. The U.S. signed its historic first Open Skies agreement with the Netherlands on September 4, 1992.

U.S. airline industry reacted as expected -- reminding us of deficiencies we fully understood. One CEO of a major airline informed me that he would now have to fire 5000 employees because of the damage done to his markets by the agreement. Critics reminded us that the statute said we could allow KLM to increase its access to U.S. points only "in exchange for benefits of similar magnitude." Had we lived up to that requirement?

As Secretary Card knew, DOT had anticipated the question in its initial Open Skies policy proposal, and it had asked interested parties to comment on it. After reviewing the submissions, the Department addressed the issue in its final order adopting the new policy:

> We are frankly and firmly committed to freer trade in civil aviation services, and our commitment is grounded, in large part, on our experience with both the market-oriented and the restrictive approaches that govern many of our current bilateral aviation relationships. We have seen much larger dividends in those markets which allow greater scope for airline prices and service initiatives. Indeed, if we were to embark on negotiation initiatives only where we could anticipate precisely equal economic benefits we would have been deterred from some of the most successful agreements we have achieved in the last decade. As with the Cities Program before, we find that the Open-Skies program represents a further progression along the path toward a truly open environment for international aviation service…[42]

Conclusion

The U.S.-Netherlands Open Skies agreement represented an important new template for government-to-government relations, as we knew it would, but it also engendered a change in industry structure that nobody in government had anticipated. Northwest Airlines and KLM had earlier forged a joint venture. Even before the ink was dry on the new agreement, representatives of both airlines visited DOT with a radical proposition: Because the U.S.-Dutch aviation market was now open and competitive, DOT should confer antitrust immunity[43] on the Northwest-KLM joint venture. A grant of immunity, they explained, would enable the two airlines to act as one, thereby enhancing efficiency, enabling much closer cooperation, and thereby delivering a much higher level of seamless international service to their customers. DOT conducted a public proceeding toward the end of 1992 in which it solicited public comment on the proposal. Early in 1993, DOT granted most of the immunity the airlines had sought.[44]

The immunized joint venture enabled Northwest and KLM to become more effective global competitors, and the advantages of the arrangement were quickly noticed by other airlines. DOT had made clear in its order granting antitrust immunity that it would be conferred only in markets that were fully open to competition – i.e., markets governed by Open Skies agreements. European airlines and those from other regions began urging their governments to enter into Open Skies agreements with the U.S. in the hope that they too could obtain antitrust immunity for their joint ventures.

In retrospect, it was the interest expressed by domestic and foreign airlines in securing antitrust immunity for their increasingly important alliances that accelerated the movement toward Open Skies following 1992. After two years of further deliberation, the Clinton Administration adopted the policy, as did every subsequent administration, Democratic or Republican. As noted earlier, the U.S. has entered into 120 such agreements as of this writing.

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42 *Id*. at 2.

43 The power to immunize cross-border agreements of airlines from the operation of the antitrust laws had long been a tool used by the Civil Aeronautics Board, particularly for the purpose of shielding inter-airline agreements on standards and even air fares in some markets from antitrust litigation. The power was transferred to DOT at the end of 1984 with the "sunset" of the CAB. 49 U.S.C. §§ 41308 and 41309. Airlines are prohibited from entering into cross-border mergers by the national laws of most countries as well as by traditional bilateral aviation agreements, most of which require that airlines based in a particular national territory be owned and controlled by citizens of that country. Obtaining antitrust immunity enables participants in a cross-border joint venture to enjoy most of the benefits of a merger without actually merging.

44 DOT Docket 48342, Order 93-1-11, Jan. 11, 1993.

The immunity granted to cross-border joint ventures has engendered three global airline alliances – Oneworld, Skyteam, and the Star Alliance – and they have largely redefined the international air transport marketplace. Of equal importance, the advent of Open Skies has also facilitated a variety of other innovations in the provision of international air services, from the low-cost flights within Europe offered by Ryanair and EasyJet, to the “superconnector” model forged by Emirates, Etihad, Qatar, and Turkish Airlines, to the multinational footprint established throughout South America by LATAM, to the low fares offered across the Atlantic by Norwegian, Wow Air, and British Airways’ aptly named subsidiary, Open Skies.

In 2008 the U.S. and EU signed an Open Skies agreement that superseded many bilateral agreements that the U.S. had forged earlier with EU Member states – including the 1992 agreement with the Netherlands -- and added the U.K. to the Open Skies club for the first time.

Most importantly, bilateral Open Skies agreements are now increasingly common between pairs of countries that do not include the U.S. It may be too soon to call it a default policy in much of the world, but Open Skies policies are more and more ubiquitous. The policy is bringing untold value to travelers, airlines, and economies everywhere.

Without the vision and courage shown by Secretaries of Transportation Sam Skinner and Andy Card, Open Skies might still be nothing more than an aspiration. The world owes them a huge debt of gratitude.

APPENDIX

JCS 10/23

U.S. Department of Transportation

Office of the Secretary of Transportation

Assistant Secretary

400 Seventh St., S.W.
Washington, D.C. 20590

October 20, 1989

NOTE FOR THE SECRETARY

FROM: Jeff Shane

SUBJECT: Initiative on International Aviation Liberalization

My counterpart at the State Department (Gene McAllister, Assistant Secretary of State for Economic and Business Affairs) and I want to formulate some ideas for what could become a major Bush Administration initiative on international aviation liberalization. It would go beyond our "unserved cities" proposal of a few weeks ago, and would begin to move the world toward a far more rational approach to international air services. The initiative would almost certainly require an EPC presentation. Lehman Li, who organizes the agenda for EPC's, is extremely enthusiastic, and has asked us to create an EPC working group as a first step.

I believe that we can find a formula that will win the support of all of our communities (and thus their congressional delegations) as well as most, if not all, of our airlines. Implementation -- a genuine opening of international aviation markets -- would require the agreement of a "critical mass" of important partners. No one partner, by itself, can offer us enough in the way of new opportunities to justify any major movement on our part.

The initiative might well trigger a scramble within the EC to join up, thereby defusing much of the "fortress Europe" problem. It would also hold so much more promise than the Uruguay Round that it would moot USTR's arguments about aviation in the GATT.

By happenstance, we are scheduled to have bilateral negotiations with our four most important European aviation partners between now and the end of the year: France, Germany, Italy, and the U.K. If we are able to formulate some ideas quickly, we might be able to use these rounds to explore, informally and preliminarily, whether the Europeans would be receptive to a proposal.

cc: The Deputy Secretary
Ken Quinn

Jeff, 10/24/89
Go for it
Sam

DOT and Me

S. Fred Singer

I was asked to contribute a few personal recollections, celebrating the 50th birthday of DOT, the US Department of Transportation

My first contact was in 1970, when FAA chief Wm Magruder asked me (then serving as a Deputy Assistant Secretary of Interior) to chair an inter-agency panel to evaluate the environmental effects of the two prototypes of a supersonic transport aircraft (SST), then under construction at Boeing. The main issues were the putative effects of water vapor (WV) exhaust on depletion of stratospheric ozone and a possible rise in the rate of skin cancers.

We learned much from this exercise:

1. An SST for passenger travel may not be commercially viable. 2. The skin cancer model was wrong. 3. And WV was not the most important ozone depleter; it was the exhaust of nitrogen oxides. 4. We found that the ongoing human-related production of methane should lead to the stratospheric WV equivalent of a fleet of 500 SSTs. [I published this conjecture in *Nature* in 1971, after *Science* mag rejected my paper.]

In 1987 I was recruited from the U of VA to the post of DOT Chief Scientist, mainly to supervise the FAAs design of their new Air Traffic Control system – a real challenge. But I also had responsibility for civilian applications of GPS, a task assigned to DOT by the Defense Department. Little did we anticipate the explosive growth of GPS.

I recall a Senior Staff meeting where I asked my colleagues: "Do you ever wake up and wonder: Where am I and where am I going? Well, this little GPS receiver will tell you." No one believed me at the time.

BTW, I was most impressed by the competence of the women of the Senior Staff. Maybe I should not have been surprised, but having spent my career in engineering and hard sciences, it felt like a discovery.

Probably, the most fun aspect of my job was working on simulators around the country. I crashed trains in Pueblo, CO, cars in Ohio, and ran ships aground in King's Point, NY. But nothing beats smashing airplanes into the tarmac at the flight simulator in Oklahoma City.

DOT and the Environment

Martin Convisser

The Department of Transportation was established in 1967 at a time of growing national environmental concern and action. In fact, the DOT Act itself contained a very specific and significant environmental provision, Section 4(f), which is discussed below.

These environmental concerns were strongly reflected in statutes, court decisions, policies and administrative decisions during the early years of the Department that significantly influenced the development of the national transportation system in the ensuing years, and continue to do so today. Some of these key developments are discussed below.

Assistant Secretary for the Environment. An early and important step occurred when Sec. Volpe took office in 1969 and established the position of Assistant Secretary for the Environment and Urban Systems (TEU in organizational shorthand). Sec. Volpe gave TEU strong support throughout his tenure. This was critical because some of the modal administrations, particularly the Federal Highway Administration (FHWA), strongly opposed environmental constraints on their programs.

Section 4(f). This provision of the DOT Act stated that "the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic sit unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm" to such land.

This provision reversed decades of implicit transportation policy that often preferred such areas for project construction in order to reduce costs and displacement in built-up residential or commercial areas.

Of central importance in implementing Section 4(f) was Sec. Volpe's decision to delegate his authority under this provision to TEU, rather than to the modal administrations (despite strong opposition from some modal administrations to this delegation of "line" decisions to a "staff" office). In effect, this meant that a transportation project falling under Section 4(f) could not proceed unless the Assistant Secretary approved the project.

The seminal project where a modal administration decision was reversed or significantly modified was Interstate 40 through Overton Park in Memphis. After a Supreme Court ruling in that case which emphasized "no feasible and prudent alternative" and "all possible planning to minimize harm," DOT rejected the project. Following the standards set in the Overton Park decision, numerous other projects (primarily Interstate highway proposals) were abandoned or significantly modified, including, for example, the proposed Riverfront Expressway in New Orleans, I-93 through Franconia Notch in New Hampshire, I-10 in Phoenix, and a proposed I-66 crossing from Virginia into Washington, DC.

National Environmental Policy Act (NEPA). Signed into law on January1, 1970, NEPA had a major impact on the Department's programs in the following years.

NEPA set forth a national policy of promoting efforts to "prevent or eliminate damage to the environment," and created the Council on Environmental Quality (CEQ) to oversee implementation of the Act. Further, NEPA established the requirement that a detailed environmental impact statement (EIS) be prepared for any major federal action "significantly affecting the quality of the human environment." The EIS was (and is) required to discuss the environmental impact of the proposed action and alternatives to it.

Under requirements established by CEQ, a draft EIS had to be prepared and circulated for comment to the public and appropriate federal, state, and local agencies. After taking those comments into consideration, the acting agency had to publish a final EIS before it could proceed with the contemplated action.

Within DOT, a key decision was the assignment of responsibility for implementing the EIS requirement. Some modal administrations strongly urged that they should have full authority for implementing this provision. FHWA, for example, argued that personnel in the Office of the Secretary (e.g., TEU) were not trained or knowledgeable enough on highway matters to analyze and question the judgments and conclusions of federal and state highway experts. Further, they opposed centralizing project approval authority in Washington, rather than at the state level, where it had been located in FHWA's long-standing decentralized decision-making process. Finally, they argued that the highway program had long and adequately practiced environmental protection.

TEU, on the other hand, took the position that leaving full authority for the EIS with the modal administrations would not result in any significant change in the environmental protections envisaged by the Act.

That argument, and the earlier assignment of Section 4(f) authority to TEU, helped pave the way for Sec. Volpe to also assign authority for approval of the final EIS to the environmental Assistant Secretary. Since major projects with significant environmental impacts could not proceed without approval of a final EIS, this decision in effect gave the Assistant Secretary final authority to approve or disapprove such projects.

The EIS soon became a key element in DOT project and program decision-making, with significant effects.

To begin with, the EIS tended to become a full disclosure document. The fact that a draft had to be circulated for public and agency comment tended to lead to a less self-serving and broader analysis. As one example, the identification of the full noise impacts of urban highway projects led to mitigating actions such as the noise abatement walls now common alongside major highway projects throughout the nation; none existed before the implementation of NEPA.

The NEPA process in DOT also resulted in the expansion of the range of alternatives considered. Again using highway projects as an example, mass transit approaches such as reserved bus lanes, and traffic management approaches such as high occupancy vehicle lanes and traffic metering, were considered and adopted, which had rarely been the case before.

Both the EIS as a full disclosure document and its expansion of the range of alternatives helped support another key element of NEPA - the amelioration or avoidance of adverse impacts. Techniques included scaling down project size, avoiding sensitive environmental areas, and measures to compensate for adverse impacts. Examples include the following:

- Sec. Coleman›s decision in 1976 to forbid the Concorde from flying at supersonic speeds in the U.S. eliminated the potential huge noise impact of that aircraft›s sonic boom.

- The scaling back of I-66 inside the Beltway in Northern Virginia from an 8-lane highway (in some places) to four lanes, with transit, traffic management, noise abatement and other environmental enhancements, substantially reduced the highway's impacts on the dense urban community through which it passes.

- The decision was made not to build the proposed major jetport just north of the Everglades

National Park in Florida after the EIS disclosed that the airport and accompanying development would have large impacts on wetlands, including a potentially devastating impact on water supply to the Everglades. As a result, the Department of the Interior, with DOT support, obtained Congressional approval of the Big Cypress Fresh Water Preserve to protect the Park›s environment.

The Social Environment. The “environment” that DOT was concerned with during these years was not only the physical environment, but also the social environment.

One effect of the EIS process on the social environment was to avoid or significantly modify projects which otherwise would have had a disproportionate adverse impact on low income or minority communities.

Beyond that, probably the most significant effect of increased consideration of the social environment was a major increase in attention to transportation for the handicapped and the elderly, which particularly impacted the Department’s mass transit program. As new rapid transit systems and expansions of existing ones were undertaken, elevators in stations were included for the first time, safeguards for visually impaired persons were installed, and other measures taken to make access available and safe for persons with mobility limitations. Efforts were undertaken to improve the accessibility of buses, and special bus services for the elderly and the mobility impaired were started and have since been expanded nationally. Dramatically improved access to air travel was also provided for persons with disabilities, based in large part on DOT/FAA initiatives subsequently implemented by the airlines.

DOT also promoted curb cuts to ease pedestrian movement for the elderly and handicapped, and promoted bicycling, particularly through the creation of special bicycle lanes, which are now widespread.

DOT also started a program to encourage improved aesthetics in transportation projects. Termed “Design, Art and Architecture in Transportation,” it provided financial incentives to encourage improvements in these areas. An example of the results is the art included in the main passenger area of Washington Reagan National Airport.

Sec. Volpe›s successors in the 1970s generally continued to maintain and encourage pro-environment approaches. Perhaps more importantly, the approaches and procedures initiated in those years became institutionalized and are, even now, a standard part of transportation planning and programs.

It was a great opportunity, most rewarding, and great fun, to help get this going.

Early DOT: Three Environmental Histories

Laurence J. Aurbach

The late 1960s and 1970s were a time of transition for US public policy, emphasizing quality of life in post World War II American urbanization. The new US Department of Transportation assumed the management of the Interstate Highway System, the greatest public works project in the history of man, and of aviation in the jet age. These monuments of human progress had some adverse impacts on the quality of life in urban America. DOT was positioned to manage this transition.

I was a delegate from California to Lady Bird Johnson's White House Conference on Natural Beauty. The Conference was prior to the identification of environmental quality as a term and umbrella for public policy. It brought together hundreds of leaders to consider policy issues beyond pollution control. In 1970 Richard Nixon established by executive order the Environmental Protection Agency and NOAA. Congress adopted new environmental legislation adding to pollution control legislation from the earlier1960s.

I joined the Department of Transportation's new environmental office in 1970. Here are three environmental policies and results that I worked on in the 1970s during my time in DOT, that provide a sense of the time.

1. DOT Order 5610.1B, Procedures for Considering Environmental Impacts published in the Sept. 30, 1974 Federal Register. These orders provided administrative guidance for managing environmental impacts in transportation projects. The order provided guidance in these areas:

- The National Environmental Policy Act
- Section 4(f) of the DOT Act regarding parks and historic properties
- The Clean Air Act
- The National Historic Preservation Act
- The Coastal Zone Management Act
- The Fish and Wildlife Preservation Act
- Standards as to Noise, air and water pollution
- Executive Order on protection of the cultural environment
- Executive Order on regarding flood hazards
- The Water Bank Act regarding wetlands.

The Order provided a framework for administration and environmental training programs for the highway and aviation programs so the responsible managers and engineers could manage within the legal context. For aviation, the FAA Academy in Oklahoma City adopted such a training program. FHWA also had its own training programs.

The Secretary also provided a mandate that people and public facilities would not be displaced until replacements were provided. The Uniform Relocation Act supported the policy.

NEPA Section 102(a) required a systematic, interdisciplinary approach, so that those with experience in appropriate fields would cover all impacts.

Several transportation projects with environmental issues that I dealt with included:

- I-290 through communities and Shaker Lakes, Ohio, canceled

- The Sunrise Highway extension to Montauk, NY, canceled, the end of the line for Robert Moses projects.

- The South Midtown Freeway in Kansas City, Mo, redesigned as a parkway in accordance with KC road tradition.

- The Washington Metro system was approved and built

- The Atlanta Metro system was approved and built.

I've heard little of urban freeway controversies since adoption of these procedures.

2. The Aviation Noise Abatement Policy issued Nov. 18, 1976, which recognized that 6 million people lived in areas adversely affected by aircraft noise. There had been confusion about responsibility for dealing with airport noise. The policy spelled out the responsibilities of parties to control noise. The FAA held hearing in 25 regions to get input for the policy.

Summarizing the results,

- The FAA is responsible for airspace use and management, and control of noise from its source, the aircraft.

- The airport proprietor is responsible for airport location and design subject to constitutional prohibitions on creating an undue burden on interstate commerce, discrimination, and interference with federal airspace management.

- State and local government control land use and other police powers not affecting aircraft operations.

- Pilots are captains of their ships with traditional control over operations.

The policy encouraged Airport Noise Control and Land Use Compatibility Plans where the airport operator coordinates detailed plans to minimize adverse impacts of airport noise within the proper relationship between the federal government and state and local governments. The purpose is to establish the framework for plans by airport operators, affected local jurisdictions, airports users and pilots, the FAA and citizens within the framework of effects on national and international air commerce, airspace management, and unjust discrimination.

The policy sets forth limits on federal intervention as raised by the Federalist Papers prior to adoption of the US Constitution and as taken up recently by the US Supreme Court.

3. The use of funds from canceled I-66 and I-95 to cover the District of Columbia's payment for building Metro.

Through the sixties a number of regions experienced freeway revolts. One of my DOT colleagues said the Interstate system was like a barrel of apples and we were getting to the bottom of the barrel. In the DC area, I-66 would have crossed the Potomac River at the Three Sisters islands, gone through Georgetown and under the Lincoln Memorial. Parts of the Three Sisters Bridge were carried away in Hurricane Agnes in 1972. I-95 was to cut through communities in NE Washington and Prince Georges County on the way to the Washington beltway.

Both projects were fought at the local level and abandoned. There were no plans for replacement. In 1973 Congress passed the Interstate Transfer provision. I had a chat with Comer Coppie, the DC Treasurer, at a neighborhood meeting and asked if he knew of the procedure. One lunch and several years later the $2 billion for I-66 and I-95 was reprogrammed to cover the District of Columbia's share of building the Metro system.

DC finances seem to be doing well now.

In the 1970s DOT managed the transition to environmental procedures as they affected transportation. I'm pleased to have had a role in the process.