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No Regulation without Representation

A Snapshot of the Federal Regulatory State from Ten Thousand Commandments 2005

The exact cost of the federal regulatory state may never be fully known. As with taxes, firms generally pass along to consumers some of their regulatory compliance costs. Yet governmental and private data exist on scores of regulations, their costs and benefits, and the agencies that issue them. By compiling and presenting this data in a way that makes the regulatory state more comprehensible to the public, the annual *Ten Thousand Commandments* report aims to shed light on the impacts of regulation, and propose ways to increase regulatory accountability. Following are highlights from the 2005 report.

Regulation by the Numbers

In the FY 2006 federal budget, President Bush proposed $2.57 trillion in discretionary, entitlement, and interest spending. While those costs fully express the on-budget scope of the federal government, there is considerably more to the government's reach than the sum of the taxes sent to Washington. Federal environmental, safety and health, and economic regulations cost hundreds of billions of dollars every year—on top of official federal outlays.

• The number of pages in the *Federal Register*, the daily depository of all proposed and final federal rules and regulations, is the most often cited measure of the scope of regulation. The 2004 *Federal Register* contained 75,676 pages, a 6.2 percent increase from 71,269 pages in 2003. This is an all-time record.

• In 2004, agencies issued 4,101 final rules, a 1 percent decline from 2003. In contrast, Congress passed and the President signed into law a comparatively low 299 bills that year.

• The *Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions* appears in the *Federal Register* every December. It details rules recently completed and those anticipated within the upcoming 12 months by the roughly 60 federal departments, agencies, and commissions. Therefore, the *Agenda* serves as a gauge of what is coming down the regulatory pipeline. In the 2004 *Unified Agenda*, agencies reported on 4,083 regulations at various stages of implementation, a 4 percent drop from the previous year's 4,266.

• Of the 4,266 regulations now in the pipeline, 135 are "economically significant" rules that will have at least $100 million in economic impact, an increase from 127 such rules in 2003. Those rules will impose at least $13.5 billion yearly in future off-budget costs.

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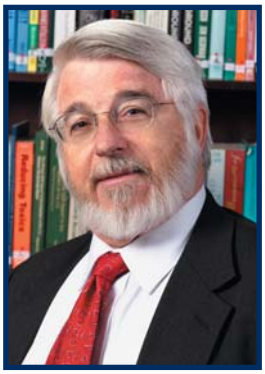
>>FROM THE **PRESIDENT**



Batman's Lessons

by Fred L. Smith, Jr.

Given the enormous amounts of money advocates of bigger government throw about these days, many market liberals long to find our own "George Soros." Left-liberal activists have long dominated major philanthropic foundations like Pew, Rockefeller, and Ford. Yet the new wave of entrepreneurs now entering the philanthropic circles seem oblivious about supporting free market groups. *The Washington Post* reports that one group of left-leaning entrepreneurs agreed to raise another $80 million annually to bring "balance" to the think tank world. Balance—really? Economic statists already control most major foundations, the schools, and the media, hold critical slots in business and government bureaucracies—and now they want to dominate the think tanks, too. Fighting the battles for economic liberty has been hard. It is likely to get even harder.

Advocates of free markets have yet to resolve the logistical battle—how to garner the resources to wage the war for economic liberty. Free market platoons have been waging a multi-front war against collectivist divisions. And, unfortunately, as history shows, victory generally goes to side with the biggest battalions. Ideas matter, but, as the last century shows, bad ideas can win out over good ones. So how can we acquire the resources to ensure that our ideas are heard in the cacophony of the public policy world? One answer is suggested in that memorable line from the movie *Jaws*, where the great white has nearly chopped to bits the fishing vessel: We need a bigger boat! That is, resources matter and we need more of them.

I thought of this recently, when I saw *Batman Begins*—a movie that many free market advocates have enthusiastically endorsed for its individualist message. I liked it also. Gotham's crime problem, the movie showed, was strongly linked with government corruption. But when it became obvious that: 1) Bruce Wayne was very wealthy; and that 2) he planned to use his wealth to finance a personal crusade against crime, I thought, "No, Bruce, be entrepreneurial! Leverage that investment to create a portfolio of liberty-promoting groups to challenge the whole corrupt system."

But, of course, he didn't. Movie theatres—at least from the audience side of the screen—are not an ideal venue for policy strategizing. Still, if and when we find the equivalent of our George Soros, I'll certainly make those points.

Yet Bruce Wayne's course of action is not surprising. Entrepreneurs are doers, not intellectuals. They want to act directly and rarely understand the need to invest resources to defend the institutions critical to their own success and to continued economic liberty. Absent these institutions—rule of law, private property, enforceable contracts—few wealth-creating enterprises would thrive.

So what should they do? Entrepreneurs are unlikely to find allies among the Chattering Class. An alliance with the remnant of market liberal intellectuals is their—and our—best hope to counteract the trial lawyer-bureaucrat-intellectual coalition that so threatens economic and individual freedom.

Bruce Wayne's major shortcoming was that he sought to go it alone. The economic success of Wayne Enterprises was the achievement of many individuals working for a common goal. Had he assembled a group of his fellow businessmen to join in the fight for liberty, he might see more lasting results. Resources matter and alliances make it possible to mobilize those resources.

Bruce Wayne had a lofty goal. He sought to do as much as any one individual might expect to achieve. But he did not think through the reasons why Gotham had become so corrupt, why so many good individuals sought to profit by rent-seeking rather than by wealth creation. He sought to combat evil but not to expand the institutions of liberty. He did not think through the ways in which economic liberalization would reduce the temptations to seek political preference, and lower the likelihood of violence and fraud. Yet he certainly realized that political control of public safety had not made Gotham City secure.

My message to Bruce Wayne and the entrepreneurial community is simple: Think of public policy the way you think of other investments. Is it best to put all your eggs in one basket or to fund a diverse portfolio of policy initiatives—which approach is more likely to yield the highest return? A leveraged use of your resources would make it possible to defend and expand economic liberty—not only in Gotham but throughout America and the world.

Fred Lee Smith Jr

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No Regulation without Representation

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• The five most active rule-producing agencies—the departments of Treasury, Homeland Security, Transportation, and Interior and the Environmental Protection Agency—with 1,850 rules among them, account for 45 percent of all rules in the Agenda pipeline.

• Of the 4,083 regulations now in the works, 789 affect small businesses. Rules affecting small businesses are down 8 percent over the past year and 25 percent over the past five years.

• The Office of Management and Budget's 2005 draft report on the costs and benefits of federal regulations finds cumulative 1994–2004 costs of major regulations to be between $35 and $39 billion; meanwhile, the estimated range for benefits was $68 billion to $260 billion.

• Based on a more broadly constructed compilation of annual regulatory costs by economists Thomas Hopkins and Mark Crain, regulatory costs hit an estimated $877 billion in 2004—an amount equivalent to 38 percent of all FY 2004 outlays, 7.6 percent of U.S. gross domestic product (estimated at $10,980 billion for 2003), and more than twice the $412 billion budget deficit.

• Federal regulatory costs of $877 billion combined with outlays of $2,292 billion bring the federal government's share of the economy to some 27 percent.

• Regulatory costs exceed all corporate pretax profits ($745 billion in 2002), estimated 2004 individual income taxes of $765 billion, and 2004 corporate income taxes of $169 billion.

The Hidden Costs of Regulation

The U.S. government recently ended its short-lived string of budgetary surpluses—the first since 1969. To regain and maintain a true surplus, policy makers must control regulatory costs. The maximum surplus projected by the Congressional Budget Office over the coming decade is a minimal and highly speculative $71 billion in 2012. Regulatory costs of more than $800 billion dwarf that amount. Moreover, regulations can substitute for taxes. Unless regulatory activity is better monitored, deficit control could prompt Congress to adopt new off-budget private-sector regulations rather than new spending that would increase the deficit. If regulatory costs remain hidden, regulating will continue to look like an attractive alternative to taxing and spending.

Years of unbudgeted regulatory growth merits concern. Most of the time we simply don't know whether regulatory benefits exceed costs. Congress bears much of the blame by delegating too much lawmaking power to agencies, and by failing to require that they deliver greater benefits than costs. Thus, agencies can hardly be faulted for not guaranteeing optimal regulation or for not ensuring that only "good" rules get through. Agencies face overwhelming incentives to expand their turf by regulating even in the absence of demonstrated need, since the only measure of agency productivity—other than growth in its budget and number of employees—is the number of regulations. The unelected rule when it comes to regulatory mandates.

"No Regulation without Representation"

Congressional accountability for regulatory costs assumes new importance in this era of vanished budget surpluses. Disclosing costs of rules would remain key, just as disclosure of program costs is critical in the federal budget. Simple "regulatory report cards" can be issued each year by the federal government to distill the available, but scattered, regulatory data.

Regulations should be treated like federal spending: Whenever possible, Congress should be accountable for federal regulations' compliance costs—and benefits. Cost/benefit analysis is often proposed to police excess regulation. But this can often take the form of agency self-policing; agencies would perform "audits" of their own rules, but would rarely admit that the benefits of a rule do not justify the costs involved. At the least, some third-party review would be needed.

Since agencies are unaccountable to voters, an annual regulatory report card is a start but not a complete answer. Nor are regulatory reforms that rely on agencies policing themselves capable of harnessing the regulatory state. Instead, requiring Congress to vote on agencies' final rules—in expedited fashion—before they become binding on the public would best promote accountable regulation.

Requiring explicit approval of all proposed regulations would ensure that Congress bear direct responsibility for every dollar of new regulatory costs. This step would fulfill citizens' expectation of "no regulation without representation."

Federal environmental, safety and health, and economic regulations cost hundreds of billions of dollars every year.

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Testimony of Senior Fellow Marlo Lewis, Jr.

to the Subcommittee on Regulatory Affairs of the House Government Reform Committee,

July 27, 2005

Chairwoman [Candice] Miller [R-Mich.]. Ranking Member [Stephen] Lynch [D-Mass.] and Members of the Subcommittee, thank you for inviting me to comment on congressional regulatory reform initiatives.

I commend the Subcommittee for holding this hearing, and for its vigilant oversight of regulatory agencies. "More oversight by Congress" is the short answer to the question of how to improve federal regulation.

Federal regulatory costs are large, growing, and, what is more disturbing, uncontrolled. The Office of Management and Budget's (OMB) 2005 draft report on federal regulation estimates the annual costs of 45 major rules reviewed by OMB during the period 1994-2004 at $34.8 billion to $39.4 billion. OMB says the total cost of all rules now in effect "could easily be a factor of 10 or more larger"—in other words, totaling between $340 billion and $390 billion annually.

This is consistent with the estimate of the Small Business Administration study by Mark Crain of George Mason University and Thomas Hopkins of the Rochester Institute of Technology, after factoring out regulatory costs that the OMB report does not include—namely, the burden of tax-related paperwork and rules governing income transfer programs.

OMB's estimate also does not include the economy-wide repercussions of the occasional regulatory disaster, such as the largely regulation-induced telecom meltdown, which contributed to and prolonged the recent recession. The 1996 Telecommunications Act, as interpreted and implemented by the Federal Communications Commission, forced incumbent local phone companies to share their facilities with challengers at below-market rates. The easy availability of cross-subsidies attracted large numbers of new entrants, creating a classic bubble of too many companies chasing too few customers.

At the same time construction and equipment purchases fell sharply, as new entrants saw no need to build, because they could lease incumbents' facilities on the cheap, and incumbents feared that any assets they might build would just end up subsidizing rivals.

In any case, the regulatory burden is large and growing. Agencies promulgate in excess of 4,000 rules per year. James Gattuso of the Heritage Foundation found that about three fourths of all the major rules adopted during 1992 to 2003 increased rather than decreased regulatory burdens.

These costs are uncontrolled. Nothing in the current process requires or even allows elected officials to make explicit choices about the costs of regulatory programs.

> "***Federal regulatory costs*** *are large, growing, and, what is more disturbing,* ***uncontrolled.***"

During the past three decades, Congress has adopted, debated, or considered numerous regulatory reform proposals. The specific provisions or elements of these initiatives typically fall into one of two categories that, for want of better terms, I call policing reforms and checks and balances reforms.

Policing reforms aim to regulate the regulators by establishing rules of rulemaking and tasking OMB to review agencies' compliance with those rules.

Checks and balances reforms seek to de-monopolize agency decision making by increasing Congress's responsibility for regulatory decisions, fostering interagency competition, or enabling outside experts to compete for public approbation with agency experts. Both types of reforms will be needed to make the regulatory system more affordable and accountable. However, a word of caution is in order.

In the past, reformers have relied heavily on policing reforms. Pinning their hopes on what James Madison called "parchment barriers," reformers have proceeded as if agencies could be legislated or managed into practicing sound science and economics. The results, as my written testimony chronicles, have been disappointing.

Rules of rulemaking are not self-enforcing. Furthermore, OMB is a watchdog in constant danger of becoming a rubber stamp, because the OMB Director and the agency heads all are appointed by the same president and are part of the same administration.

To say that "more oversight by Congress" is essential to regulatory improvement is really to say that we need more checks and balances in the regulatory process. To paraphrase Madison, agency must be made to counteract agency, and outside experts must be allowed to compete with agency experts.

I am pleased to say that all the bills this Subcommittee is examining today emphasize checks and balances reforms. They seek to increase Congress's participation in and responsibility for regulatory decisions. Rep. J.D. Hayworth's (R-Ariz.) bill, the Congressional Responsibility Act (H.R.931), explicitly aims to enforce compliance with Article I, Section 1 of the U.S. Constitution, which requires Congress to approve agency rules before they can take effect. Rep. Sue Kelly's (R-N.Y.) bill, the Cut Unnecessary Regulatory Burden (CURB) for Small Business Act (H.R.1167), would enhance Congress's analytic resources to review federal rules. Rep. Bob Ney's (R-Ohio) bill, the Joint Committee on Agency Rule Review Act (H.R. 576), would create a new joint committee to strengthen Congress's institutional capability to review regulatory proposals.

I would like to call your attention to a modest proposal devised by former OIRA economist Richard Belzer. The goal of the proposal is to enable outside experts to compete with agency experts. Statutes like the Small Business Regulatory Enforcement and Fairness Act (SBREFA) and various executive orders create a huge demand or market for regulatory analysis, but it is a market in which agencies currently face little competition and no market test for their "products." Outsiders are free to submit alternative cost-benefit estimates, but the agencies ultimately decide which estimates are best. This is problematic, because it allows agencies to have the final say in grading their own work.

Agencies, in other words, monopolize the power to score their own proposals. But they have no monopoly on regulatory expertise. Corporations, think tanks, universities, small business associations, and state and local governments employ hundreds, perhaps thousands, of professionals trained in economics and science.

In a nutshell, Belzer proposes that Congress require OMB to hold contests to pick the best analyses of selected major rules. OMB would be forbidden to split the difference or take some from column A and some from column B. OMB might be biased in favor of the agency by virtue of being on the same team, but the contest would be run in the full light of day, and if OMB were to always give the prize to agency analyses, it would lose all standing in the regulatory community and before the public.

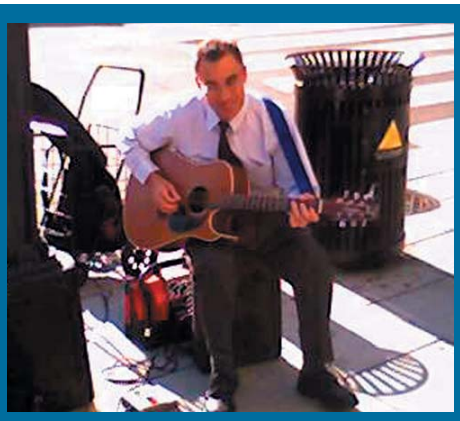
The contests would put pressure on the agencies to produce credible analyses. To have a realistic chance of winning, their analyses would at a minimum have to conform to OMB's best practices and information quality guidelines.

Some might object that making OMB the judge would simply transfer monopoly power from the agencies to the White House, giving undue influence to the President or his appointees. That is a reasonable concern, but it also easily addressed. "If for whatever reason you do not have sufficient trust in OMB's judgment," says Belzer, "ask GAO to evaluate the same information and reach its own conclusions. Even OMB can benefit from some competition."

Thank you again for the opportunity to testify. I would be happy to answer any questions.

Meet CEI's Experts

Marlo Lewis, Jr.



Marlo Lewis, Jr. is a Senior Fellow at CEI, where he writes on global warming, energy policy, and other public policy issues. Prior to joining CEI in April 2002, he served as Director of External Relations at the Reason Foundation in Los Angeles. During the 106th Congress, Marlo served as Staff Director of the House Government Reform Subcommitte on National Economic Growth, Natural Resources, and Regulatory Affairs. His interests include the science, economics, and politics of global warming policy; the precautionary principle; environmentalism and religion; and the moral basis of free enterprise. The editors of CEI Planet recently asked him to tell us more about himself.

What attracted you to work in public policy?

The eternal struggle between freedom and tyranny, to put it somewhat grandiloquently. I grew up during the wild and wooly '60s, and early on decided that the New Left had it all wrong. Ho Chi Minh was a tyrant, not a liberator; the Soviets, not the United States, threatened world peace; and capitalism was a blessing, not a curse. In the 1980s, I noticed that the New Left were now tenured professors and reprising all their old arguments, except this time to promote the Sandinistas and other Soviet-backed forces in Central America. The Cold War was building to a climax, and after teaching college for a few years, I wanted to contribute to national security policy. I was fortunate enough to work in two State Department bureaus during the second Reagan Administration. When the Cold War ended, I continued to work on public policy issues, but my emphasis shifted to economics and the defense and reinvigoration of limited government, as I began to appreciate the appalling extent to which confiscatory taxation, special-interest spending, and market-rigging regulation had become politics as usual in Washington.

Which would you consider your most significant achievement during your time at CEI?

Bad policy ideas seldom die; they just get recycled. Consider "credit for early action," a mischievous initiative cooked up years ago by Environmental Defense, the Pew Center on Global Climate Change, and Sen. Joe Lieberman (D-Conn.) This is a strategy to build a pro-Kyoto business lobby by awarding companies regulatory credits for "voluntary" carbon dioxide reductions. The credits are assets that mature and attain full market value only under a Kyoto-style cap on greenhouse gas emissions. Consequently, every participating company would have an incentive to lobby for a cap. CEI was instrumental in killing this scheme not once, not twice, but three times. I am proud to have been our point person in this fight.

You're also a musician. What kind of music do you like to play?

I play acoustic guitar and mandolin. I like to play folk music, Grateful Dead-influenced music, and bluegrass.

The Truth about Human Testing:

When Green Hype Trumps Science

BY ANGELA LOGOMASINI

"It's time for the Bush Administration to realize that children shouldn't be used as guinea pigs," says a Natural Resources Defense Council (NRDC) press release last June. Such baseless hype has fueled efforts in Congress to curb the use of human volunteers in studies designed to promote pesticide safety. The result may be fewer effective products on the market to control emerging public health threats.

Both the House and the Senate appropriations language for the Environmental Protection Agency (EPA) proposed outright bans on human volunteer testing research. But the conferees recently drafted a compromise in July that places a moratorium on such studies until after EPA finalizes a rule governing ethical standards for such research.

Unfortunately, the debate is not over. You can expect the anti-chemical activists to continue their crusade against such research by spreading misinformation and pressuring EPA to limit use of studies as part of its upcoming rulemaking.

Yet most scientific bodies support ethical forms of human testing. Two EPA advisory boards jointly concluded in 2000 that human testing can be ethical and valuable when conducted under certain guidelines. And a 2004 National Academy of Sciences study supports ethically conducted human studies because they can improve "the accuracy of the science employed in regulatory decisions" and provide an important "societal benefit."

Currently, most pesticide science is conducted on rodents. As a recent report by the American Council on Science and Health demonstrates, over-reliance on rodent tests often leads agencies to grossly exaggerate risks to humans. The result is excessive regulation that leads to the removal of useful products from the marketplace without those products going through EPA's periodic regulatory reviews. Some products never make it to the market, and others languish far too long at EPA.

Anti-chemical activists—including NRDC, Environmental Working Group, and Beyond Pesticides—have pushed for a ban because they know that improved testing may help get more products approved. Indeed, human tests eliminate some of the uncertainties and some of the safety factors associated with extrapolating risks from rodents to humans. Improving scientific testing to allow EPA to adjust such factors will make policy more rational, not less safe. But that matters little to anti-chemical activists, whose only concern is to keep new chemical products off the market.

Consider that for the past seven years of the mosquito-transmitted West Nile fever outbreak, DEET has been the only insect repellant that the Centers for Disease Control and Prevention could comfortably recommend as effective. Researchers dubbed it the gold standard for protection because of its effectiveness and long record of safe use. In contrast, during the past several years, there were well over 16,000 West Nile virus cases and about 650 deaths.

Nonetheless, activist scare campaigns about DEET discourage some people from using it—leaving people at greater risk of catching the West Nile virus. Indeed, who wants to use a product that, according to the Pesticide Action Network, is a potentially dangerous "neurotoxin" that could allegedly affect brain development if they are unaware that such claims are simply hype and that DEET use has never shown such effects?

In any case, for those who did not want to use DEET, there is now an alternative—picaridin. Yet during the past West Nile outbreaks, picaridin was still working its way through the EPA approval process, which began in the early 1990s with "pre-registration" meetings. Picaridin was finally approved in 2001, but firms that wanted to incorporate it into consumer products had to gain separate approvals, which means it only recently became available to consumers.

Yet Picaridin would probably not be available today if the pending ban on human studies had been in effect during its approval process. Since the product is designed for use on human skin, testing included the use of volunteers to essentially try out the product to demonstrate its safety.

Currently, ethical codes of conduct are applied to all federally sponsored research. These standards ensure that human studies pose minimal risk to all participants, make certain that all provide informed consent, and demand that the studies undergo review by an institutional review board. According to the National Academy of Sciences, studies that observe these standards pose little risk to study volunteers. The Academy recommended that EPA issue regulations to ensure application of ethical standards for pesticide studies conducted outside government, and EPA has begun by seeking public comment for such standards. Rather than provide thoughtful input, Congress nearly trumped all scientific recommendations by proposing a blanket ban.

It's a good thing that Congress corrected its error before it was too late. Otherwise, the public might have become the real guinea pigs—subject to the "tests" posed by Mother Nature. But don't expect the scare campaigns to stop.

Anti-chemical activists can be expected to continue their crusade against human volunteer testing research by spreading misinformation.

Angela Logomasini (alogomasini@cei.org) is director of risk and environmental policy at CEI.

Challenge to the State Attorney General-Tobacco Cartel

by Christine Hall-Reis

On August 2, the Competitive Enterprise Institute launched a legal challenge to the multi-state tobacco settlement of 1998. Nearly seven years after the settlement was signed, the consequences of that $246 billion backroom deal continue to undermine the rule of law, harm consumers and taxpayers, and expand government power at the expense of liberty. The consequences extend well beyond smokers and the tobacco industry. The tobacco lawsuits and settlement of the 1990s launched a new regulator-in-chief: state attorneys general (AGs).

Before state AGs targeted major tobacco companies with unprecedented, multi-state lawsuits in the 1990s, smokers and trial lawyers had for years repeatedly sued tobacco companies over the adverse health effects of cigarette smoking. But juries consistently rejected the argument that smokers were unaware of health risks, which had become increasingly well publicized since the 1960s. It wasn't until state attorneys general stepped in that things changed.

In the early 1990s, a handful of trial lawyers and state AGs devised a new strategy for suing tobacco companies. Mississippi Attorney General Michael Moore, in partnership with prominent trial lawyers such as Richard Scruggs, filed suit against major tobacco companies, seeking to force the tobacco companies to reimburse the state for the Medicaid costs of treating sick smokers. Other states soon filed copycat lawsuits.

The state lawsuits were widely regarded as long shots initially, because the claim was untested and because states faced the same burden of proof as private plaintiffs: The states had to prove that smoking had directly caused the illnesses in question and that smokers were unaware of the health risks. Florida took the lead in dispensing with that problem. The state simply changed the rules—retroactively. In 1994, the legislature passed the Medicaid Third-Party Liability Act, which bars defendants, such as the tobacco companies, from raising those defenses in cases where the state seeks Medicaid reimbursement.

"I took a little known statute called the Florida Medicaid recovery statute, changed a few words here and a few words there, which allowed the State of Florida to sue the tobacco companies without ever mentioning the words 'tobacco' or cigarettes," boasted Florida trial lawyer Fred Levin in 1998. "It meant it was almost a slam dunk" against the tobacco industry.

Meanwhile, a Mississippi judge ruled that tobacco companies could not introduce evidence that the alleged Medicaid costs had been offset by cigarette taxes and shorter-than-average lifespans of sick smokers. Not surprisingly, Big Tobacco decided by 1997 to settle the state lawsuits in order to cap their losses. Four states—Florida, Minnesota, Mississippi, and Texas—settled their suits separately, while 46 states signed a multi-state Master Settlement Agreement (MSA). All together, settlement payments were estimated at $246 billion over the first 25 years—not including the estimated $13 billion awarded to trial lawyers.

Worse, even attorneys general who had been publicly critical of the state lawsuits, like Alabama's William Pryor, were induced to sign the MSA to get a share of the money. After all, tobacco companies would raise cigarette prices in all states to cover settlement costs, which meant smokers in every state would be paying for it. In essence, a minority of state AGs were able to railroad other states into a national tobacco tax and regulatory system.

To safeguard the new revenue stream, states agreed to protect Big Tobacco from competitors by imposing a special set of taxes and regulations. When smaller competitors, so-called Nonparticipating Manufacturers (NPMs), unexpectedly found ways to grow and gain market share, the states responded by simply changing the rules, forcing NPMs to make higher payments. As Vermont Attorney General Wil-

liam Sorrell explained in a "privileged and confidential" memo to his colleagues in 2003, "all states have an interest in reducing sales by Nonparticipating Manufacturers in every state" in order to prevent NPMs from gaining market share and shrinking settlement payments to the states.

The tobacco model represents a radical new mode of governing. Since the tobacco settlement, state AGs have targeted other industries with investigations and lawsuits, including pharmaceutical companies, investment banks, insurers, utilities, and mutual funds. And, as long as industries continue to settle such suits, they're unlikely to stop. "I thought these plaintiffs with badges would go away after they forced the tobacco industry to pay the largest settlement in the history of jurisprudence," observed former tobacco industry lawyer Phil Carlton in 2003. Instead, he wrote, "the settlement just whetted the AGs' appetites."

Attorneys general themselves have acknowledged a trend of multi-state lawsuits. At a 2004 U.S. Chamber of Commerce event, Michigan Attorney General Michael Cox said that his office receives a steady stream of "sign on requests" for multi-state suits from the National Association of Attorneys General, the organization that coordinates enforcement of the tobacco settlement. There is an "implicit incentive to sign on" to multi-state lawsuits, said Cox, in case a suit wins money. Delaware Attorney General Jane Brady, speaking at a 2004 American Legislative Exchange Council conference, reported that her office is regularly approached by trial lawyers pitching new ideas for state lawsuits.

Nearly two dozen state attorneys general have sued pharmaceutical companies over the disparity between "average wholesale prices" that impact Medicaid and Medicare reimbursement costs and the prices charged to doctors and pharmacists. A group of eight AGs sued the nation's five largest utility companies—tellingly, from other states—demanding that the utilities reduce carbon dioxide (CO_2) emissions. Once again pursuing a novel legal approach, the AGs claim that the nontoxic CO_2 emissions contribute to global warming and, thus, constitute a public nuisance under federal common law. The case is still pending in federal court.

New York Attorney General Eliot Spitzer, in particular, has targeted numerous companies and industries through investigations and lawsuits. For example, in 2002, Spitzer announced an investigation of Merrill Lynch, which quickly yielded a $100 million, multi-state settlement. A new round of investigations of other investment firms followed, along with a $1.4 billion settlement and new, "voluntary" industry regulations.

The American system of separation of powers reserves lawmaking power to the legislature and law enforcement powers to the executive branch, of which the attorney general is a part. When the state's top law enforcement officer uses prosecutorial powers to actually make law, it represents a major transfer of power to the office of the attorney general and circumvents the democratic process. Taxpayers, consumers, and affected businesses are excluded from the process, and no legislator votes on it. The result is that government becomes less accountable to its citizens.

Legal scholars and tort reformers have suggested a number of ways to curtail AG activism. With its legal challenge to the tobacco settlement, the Competitive Enterprise Institute is undertaking one such effort. The Compact Clause (Article I, Section 10) of the Constitution prohibits states from entering into any agreement or compact with another state without the consent of Congress. The Founding Fathers crafted a check on multi-state agreements by giving the federal government—Congress—the responsibility of determining whether such agreements are in the public interest. The tobacco settlement never gained the approval of Congress, which is the basis for CEI's complaint. In fact, Congress debated and rejected a similar settlement agreement proposed in 1997.

The outcome of the lawsuit will have far reaching consequences, not just for the tobacco industry and the plaintiffs CEI represents, but on all industries, taxpayers, and consumers. The case gives the courts an opportunity to enforce the words of the Constitution as written by the Founding Fathers and make government more accountable to the citizens it represents.

> "Government becomes **less accountable** to its citizens."

Christine Hall-Reis (chall@cei.org) is Director of Research and Media Coordinator at CEI.

THE GOOD

Court Dismisses Lawsuit to Force EPA to Regulate CO_2

On July 15, a federal three-judge panel dismissed a lawsuit filed by 11 states and 14 environmental groups, ruling that the Environmental Protection Agency (EPA) was within its authority to reject a 1999 petition from environmentalists seeking the federal regulation of greenhouse gases from new motor vehicles.

Judge A. Raymond Randolph of the D.C. Circuit Court of Appeals wrote on behalf of the 2-1 majority, "New motor vehicles are but one of many sources of greenhouse gas emissions. Promulgating regulations under [the Clean Air Act] would 'result in an inefficient, piecemeal approach to the climate change issue.'" However, he did not address the Bush Administration's argument that EPA lacked legal authority to regulate greenhouse gases. Judge Randolph said he and Judge David B. Sentelle assumed that EPA had the power to regulate, but for the purposes of this case "the question we address is whether the EPA properly declined to exercise that authority."

Yet, as CEI Senior Fellow Marlo Lewis, Jr. notes, the Clean Air Act grants no such authority to EPA. "The Clean Air Act provides distinct grants of authority to administer specific programs for specific purposes," he notes. "Nowhere, however, does it mention carbon dioxide or climate change prevention, except for one mention in the context of non-regulatory provisions. Moreover, the one provision mentioning carbon dioxide explicitly admonishes EPA not to infer authority for carbon dioxide pollution control requirements."

THE BAD

Supreme Court Rules against File Sharing Services

The Supreme Court unanimously ruled on June 27 to reinstate a copyright-infringement suit on two file-sharing services, Grokster and Streamcast. The ruling reverses rulings by two lower federal courts in California, which had dismissed the suit without trial.

Justice David Souter, writing for the majority, claimed there was much evidence that the companies "acted with a purpose to cause copyright violations by use of software suitable for illegal use," and suggested that the evidence was so strong that the plaintiffs may be entitled to summary judgement. The opinion held that the appeals court had misapplied *Sony v. Universal City Studios*, the decision allowing the videotape recorder because of its capability "of substantial noninfringing uses" by focusing solely on the technology and not the Grokster and Streamcast business models.

But by ignoring file sharing software's non-infringing uses, the Court may be throwing a new roadblock to the development of new consumer technologies and innovative ways to protect copyrights. "The Supreme Court should follow its precedent in the Betamax case and let artists and consumers operating in real free markets—not politicians, judges, and corporate entertainment lawyers—determine which technologies and entertainments will thrive in the digital age," notes CEI Adjunct Analyst James Plummer. "Creative initiative by the content industries and a hands-off approach by regulators would result in more efficient ways to protect profits from copyrighted works.

THE UGLY

U.N. Wants to Control the Internet

The United Nations, the organization that brought us the Iraq Oil-for-Food Scandal, is out to control the Internet. While a 2003 U.N. attempt to seize control of the Internet failed, a number of countries, led by notorious violators of intellectual property rights including China, Brazil, and South Africa, are pushing to have the U.N.'s Working Group on Internet Governance take over the role of the Internet Corporation for Assigned Names and Numbers (ICANN), or to bring ICANN under U.N. control.

ICANN CEO Paul Twomey likens ICANN's role to that of a postal system: "[W]hat we do is ensure that the addresses on the letters work. We don't think we're a regulator. We think we're a technical coordinator." Some proposals for the U.N. "Information Society" summit in November, however, see a larger role for "government arrangements."

In addition to the burdensome regulations "government arrangements" might entail, there is the simple matter of competence. "ICANN is far from perfect," writes former CEI Warren Brookes Fellow Neil Hrab. "It's one thing to say ICANN could be improved. This is a reasonable statement. It's unreasonable, however, for China and its fellow ICANN-skeptics to claim that the United Nations would be able to do a better job of managing the Internet than ICANN, without actually demonstrating why this is true."

MediaMENTIONS

Compiled by **Richard Morrison**

Research Associates Charles Cook and Alex Kormendi examine one of the alleged causes of the devastation in the Gulf Coast:

There are many out there ready to indulge this notion and use a terrible calamity to further their own political ends. They glibly contend hurricanes are exactly the sort of result we can expect if we keep contributing to global warming and that New Orleans has reaped the fruit of our irresponsibility.

Chief among this new band of augurs is Robert F. Kennedy Jr. who has directly blamed President Bush and Mississippi Gov. Haley Barbour for the destruction caused by Katrina. He is working in tandem with self-proclaimed expert Ross Gelbspan who suggests the link between global warming and the disaster is so clear the hurricane should be re-named "Global Warming."

- *The Washington Times*, Sept. 4

Assistant Editorial Director Peter Suderman examines the two sides of the latest John Le Carré film adaptation:

The Constant Gardener, Focus Features' new thriller, plays like the grim, dour counterpart to this year's earlier globetrotting adventure film, *Sahara*. Both films pit socially conscious heroes against rapacious corporations exploiting Africa's poor.

But while *Sahara* offered jocular summer escapism, *Gardener* is self-serious, solemn, and intricate. Yet it suffers from an identity crisis—it is both a gripping, gritty thriller and a didactic, anti-corporate tract for government intervention and contrarian liberal activism.

- *National Review Online*, Sept. 2

Adjunct Analyst Dana Joel Gattuso responds to the Members of Congress who have taken issue with her analysis of "e-waste" in U.S. landfills:

No one disputes the obvious: Yes, consumers want the latest in technology and e-waste is a fast-growing part of municipal waste. But [Rep. Mike] Thompson, et al. fail to properly identify their so called "crisis."

The authors say e-waste is the fastest-growing segment of the waste stream but fail to mention it still is only a tiny amount—1½ percent—of our total municipal waste. Moreover, they don't mention the number of obsolete computers is expected to level off after this year.

The authors say the Environmental Protection Agency found "70 percent of the heavy metals in municipal landfills come from improperly discarded electronics." Untrue. EPA does report 70 percent of landfill heavy metals comes from e-waste.

But EPA is not claiming these metals are "improperly" discarded or that they leak out of the landfill. The authors inaccurately assume a link between the two.

- *The Washington Post*, August 21

Warren T. Brookes Journalism Fellow John Berlau reviews David Shoenbrod's latest book, *Saving Our Environment From Washington*:

With personal anecdote and scientific fact, Mr. Schoenbrod makes a compelling case that, by delegating lawmaking responsibility to government agencies, Congress has imposed huge costs on the economy and bad choices on the environment.

This was probably not what the Framers had in mind. The "non-delegation" clause of the Constitution—Article I, Section 1—states unequivocally that federal laws must be passed by Congress. But all too often today Congress merely sets vague goals and then delegates to regulatory bureaucrats...When the bureaucrats make controversial decisions—decisions painful to various voter constituencies—congressmen and senators complain, of course. But in fact, Mr. Schoenbrod notes, they like this system. It allows them to pass feel-good laws while blaming someone else for their effects.

- *The Wall Street Journal*, August 18

Senior Fellow Iain Murray exposes PETA's cruelty to humans and animals:

THE FBI recently declared environmental and animal rights extremism its top domestic terrorism priority. The bureau is currently investigating over 150 cases of arson, bombings and other violent crimes likely related to these movements. So does this suggest that concern over animals' welfare necessarily leads to crime? Hardly, but fanaticism does.

The animal welfare movement dates back to 1824, when William Wilberforce—a leader in the campaigns to abolish slavery in the British empire and to improve conditions in factories—helped establish the Society for the Prevention of Cruelty to Animals (SPCA) in London. Wilberforce's revulsion at cruelty to animals fit perfectly with the Christian principles on which he based his life's work. Sadly, he would be revolted by some of his self-proclaimed successors' methods today.

- *Manchester Union Leader*, July 30

Editorial Director Ivan Osorio delves into the politics behind the ALF-CIO membership split:

Teamsters President James P. Hoffa and SEIU President Andrew Stern, who announced on Monday July 25 that their unions were disaffiliating from the AFL-CIO, claim that the federation, under the direction of John Sweeney, has squandered efforts to expand union membership in favor of electoral political activity, nearly all on behalf of Democrats. The split seems to be about the fundamental question: What should be organized labor's core mission? In fact, it is about union strategy.

While Hoffa and Stern claim that Sweeney has focused excessively on politics, their own unions haven't been shy about political activity. During the 2004 election cycle, SEIU gave out $2,284,875 in campaign contributions, with 87 percent going to Democrats, according to the Center for Responsive Politics. That is down from the union's $6 million-plus efforts in 2000 to elect Al Gore and in 2002 to give Democrats control of Congress. The Teamsters' contributions also dropped off, from $3,119,140 in 2000, to $2,544,643 in 2002, and to $2,147,127 in 2004.

- *The American Spectator*, July 28

...END NOTES

It's all About Image

The Environmental Protection Agency (EPA) announced in July that it is seeking outside public relations consultants, to be paid up to $5 million over five years, to polish its website, organize focus groups on how to improve the agency's image, and ghostwrite articles based on EPA research "for publication in scholarly journals and magazines," reports *The New York Times*. In Louisiana, Lieutenant Governor Mitch Landrieu spent $955,000 of state funds on office facilities and an official apartment, reports New Orleans station WDSU Channel 6 (NBC). Landrieu declined to be interviewed, but issued a statement saying that the projects are consistent with his efforts to create a more polished image for the state.

Global Warming = More WMD?

Artist Wayne Hill has pleaded to have one of his modern art pieces returned, saying he was afraid that it may have been taken and consumed. The piece, "Weapon of Mass Destruction," was last seen at an art festival in Devon, Scotland. It was a two-liter clear plastic bottle filled with melted Antarctic ice.

Prohibition's Cutting Edge

Also in Scotland, a woman dressed as a giant pint of beer, as part of a promotion for the Caledonian Brewery, was banned from venues of the Fringe arts festival that prohibit alcohol.

U.S. OKs Commercial Space Flight

In August, the U.S. State Department cleared the way for exchanges of technical information between Scaled Composites, the Mojave, California-based company that won the Ansari X Prize for its two successful flights of SpaceShipOne, and British-based Virgin Galactic to build suborbital vehicles for commercial passenger flights. While the fleet of spacecraft is not yet built, potential passengers are already queuing up. With rates of $200,000 per seat, Virgin Galactic President Will Whitehorn says, "We have a significant level of deposits now...nearly $10 million worth."

No Good Deed Goes Unpunished

A San Marcos, Texas man was arrested after rescuing a swimmer from swirling waters on the San Marcos River in July. "I reached a point where I said, 'I'm dead,'" said Abed Duamni, 35, of Houston, who was pulled out of the water by Dave Newman, 48. Police said that Newman disobeyed orders by emergency personnel to leave the water, but the police report does not mention Newman's rescue of Duamni. "I had a very uncomfortable night after saving that guy's life," said Newman. "He thanked me for it in front of the police, and then they took me to jail." Also in Texas, Carl Basham, a decorated Marine, was told by Austin Community College officials that, despite having a Texas driver's license, car registration, and bank records, he was ineligible for in-state tuition because he had been out of Texas too long—serving two tours of duty in Iraq.

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