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Fighting For Freedom

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Tech Regulation Done Right

by Braden Cox and Andrew Delaney

As soon as new technologies are introduced, the call for government regulation inevitably rings out. And as lawmakers feel the pressure to cure technology-related societal harms, their approach has increasingly focused on regulating technology, not bad conduct.

New laws are sometimes desirable and address challenges posed by new technologies. But when are they really needed? For a useful analytical framework, we can turn to the study *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet*, published in 2000 by the Working Group on Unlawful Conduct on the Internet (which was created by a 1999 Clinton Executive Order).

Although initially criticized by civil libertarians as focusing, almost deferentially, on the needs of law enforcement, the report's analytical framework is useful for analyzing legislative proposals to curb harmful conduct—an invariable byproduct of new technology. The report considers three main steps to determine whether new laws are needed:

- First, identify the conduct and the laws applicable to it. Are existing laws sufficient to address unlawful conduct involving the use of new technology?

- Second, ask whether novel ways are needed to detect and catch wrongdoers. Does the legislation provide not just new law, but also new tools or capabilities to investigate and prosecute bad conduct?

- Third, analyze market alternatives to government regulation. What is the potential for using education and empowerment tools to minimize the risks for misuse?

Feature Photo Service

Using a similar framework, let's analyze current legislative attempts to address two major Internet-related issues: spyware and file-sharing software.

Spyware

Spyware programs are potentially harmful programs often downloaded by unwitting computer users. In the first half of 2004, EarthLink, an Internet service provider,

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In This Issue

From the General Counsel

Ketchup: More Than A Vegetable?

by Sam Kazman

The organic food industry got an unexpected boost from the Democratic National Convention this past July. The surprise came from how the candidate's wife, Teresa Heinz Kerry, was introduced to the assembled delegates by her son Chris: "My mother in my heart and mind is a force—spiritual, organic and loving; smart, funny and wise."

This peculiar choice of words led one *New York Times* writer to ruminate on the term's connotations. "In a political age that hungers for cultural codewords—from NASCAR dads to latte liberals—'organic' may take on a life of its own. The word clearly connects with an expanding slice of American consumer culture. First used in the 1940s to describe pesticide-free farming, organic is now a marketing tool for everything from soap to nuts."

While we don't buy the notion that organic products are any more wholesome than others, the marketing potential of the term is clear. But if the reporter had gone back just a few more decades, he would have discovered some interesting history concerning a less appreciated aspect of organic food—profiteering. Ironically, this episode involves the source of Teresa Kerry's fortune, the H. J. Heinz Company, and its best known product, ketchup.

The "pure food" movement began in the early 1900s, as technological advances in such areas as canning and preservatives revolutionized food processing. Consumers benefited from lower prices and increased choice, but at the same time new methods of food adulteration arose. While the health hazards of such adulteration were frequently exaggerated, there was some cause for concern. A movement arose to eliminate preservatives from processed foods. One of its earliest battles was over the use of benzoate as a preservative in ketchup.

Consumer activists claimed that benzoate was unhealthy. They were joined by certain ketchup producers, including Heinz. These companies used better ingredients and production methods than other producers. On the other hand, their ketchup was a lot more expensive—a bottle of Heinz reportedly cost more than twice as much as regular ketchup. A benzoate ban would have shut down their low-priced competitors. According to Andrew F. Smith, the author of *Pure Ketchup: A History of America's National Condiment* (2001), Mr. Heinz's position consisted of "idealism and noble purpose compounded with self-interest." It was "good business" to "curb those operators who were giving the industry a bad name—*and undercutting his prices*." [Emphasis added.]

The anti-benzoate forces lost; a good thing too, since their claims about the dangers of the substance have turned out to be wrong. In fact, their proposed ban might well have backfired, because it could have increased the incidence of ptomaine poisoning from spoiled tomatoes. But the Heinz Company went on to become a major food processor, and its success, of course, led to the fortune that Teresa Heinz Kerry inherited. There's no connection between that success and the benzoate fight, but the episode illustrates how little has changed over 100 years in regulatory battles over food.

Did Chris Heinz know about the Heinz Company's push for "organic" ketchup a century ago, when he used that term to introduce his mother to the Democratic National Convention? Maybe, maybe not, but it's an enjoyable coincidence. It seems that ketchup needn't just be a vegetable; it can also be a parable.

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Tech Regulation Done Right

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and Webroot Software, a company that produces privacy software, conducted a joint study that scanned approximately two million computers. The results: approximately 55 million instances of spyware were detected—an average of 26.5 per computer!

The Securely Protect Yourself Against Cyber Trespass Act (SPY ACT), introduced by Reps. Mary Bono (R-Calif.) and Edolphus Towns (D-N.Y.), is designed to curb spyware abuses, prohibiting the distribution of certain software programs over the Internet without notice and consent. The bill creates an expansive definition of "spyware" that could include many common, useful programs, such as Windows Update. It is one of several anti-spyware bills pending in Congress.

> Congress can advance the interests of both companies and consumers by focusing on the misuse of technology, rather than the technology itself.

Existing Laws: Title 5 of the Federal Trade Commission Act addresses unfair and deceptive trade practices. Provisions of the Computer Fraud and Abuse Act make it illegal to intercept a communication without a court order and could apply to some uses of spyware that co-opt control of computers or exploit Internet connections. State trespass, contract, tort, and fraud laws also apply.

New Tools for Investigation or Prosecution: The Internet presents a challenge to law enforcement because it is global, lacks boundaries, and provides for anonymity. But the pending spyware bills don't change the nature of the Internet, or provide law enforcement with investigative tools it doesn't already possess.

Education & Empowerment Alternatives: Products like Norton Internet Security 2004 include privacy-protecting software. And a number of products exist to eliminate unwanted applications.

Conclusion: Existing laws adequately address any misuse of software resulting in fraud or other deceptive acts. The Federal Trade Commission is already on record that spyware legislation is unnecessary. Congress should allow the combination of industry self-regulation, technological innovation, consumer education, and the enforcement of existing laws to progress.

File Sharing Software

According to the Recording Industry Association of America (RIAA), music companies have lost over $1 billion in revenues since the introduction of Napster in 1999 and other file-sharing peer-to-peer (P2P) networks. Musicians, actors, and other content owners fear that digital file-swapping of copyrighted material could undermine their "exclusive right" to potential revenue from their creativity.

Congress has moved to help copyright holders. Sen. Orrin Hatch (R-UT), for example, has introduced the Inducing Infringement of Copyrights Act of 2004 (Induce Act), which stipulates: "Whoever intentionally induces any violation... shall be liable as an infringer." It identifies "intentionally induce" to mean "intentionally aids, abets, induces, or procures" copyright infringement for commercial purposes.

Existing Laws: The Constitution's Patent and Copyright Clause grants Congress the power to secure rights to "authors and inventors" for their "writings and discoveries." Title 17, Chapter 5 of U.S. Code specifically prohibits copyright infringement and offers remedies. Common law plays a large role in deciding contributory and vicarious infringement cases—recent court cases have taken different approaches toward resolving infringement issues.

New Tools for Investigation or Prosecution: Copyright violations involving P2P networks involve individual behavior that is hard to police. Many copyright holders want the legislature to expand the definition of copyright infringement to include the distribution level (P2P system), not just the actual individual infringer (P2P user).

Education & Empowerment Alternatives: Copyright holders have several options available to protect their rights. Judicial infringement actions can focus on individual infringers. Digital rights management (DRM) allows digital copyright holders to "package" their products in ways that prevent copying. Furthermore, consumers are becoming more aware of the problems of copyright infringement and see how intellectual property plays a role in the digital marketplace.

Conclusion: Existing law adequately defines copyright violations; the Induce Act is about preventing possible distribution, an indirect "violation." Expanding the realm of copyright infringement threatens to chill the development of new technology. At this point in a complex debate, the judicial system combined with copyright self-help measures through DRM are superior routes for resolving infringement matters.

The Right Approach

Perceived technology policy issues still come down to a common variant: user conduct. Congress can advance the interests of both companies and consumers by focusing on the misuse of technology, rather than the technology itself. Under this approach, technology research and innovations will continue to flourish and enrich our economy long into the future.

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Confronting the Malaria Threat

Excerpts from Testimony by Roger Bate, Ph.D.
U.S. Director, Africa Fighting Malaria, Visiting Fellow, American Enterprise Institute, and Adjunct Scholar, Competitive Enterprise Institute
before the House Subcommittee on Africa on "Malaria and TB in Africa"

Ninety years ago, a Congressional Committee held a hearing on malaria, but its focus was slightly different. It concentrated on combating malaria in the United States.

As late as 1940 at least a million people in the United States experienced the body shaking chills, fevers, and sweats of malaria. However, using federal and private funding, the Rockefeller Foundation, the Tennessee Valley Authority, and the United States Public Health Service enacted comprehensive programs to counter the conditions under which malaria flourished in the U.S. Through a combination of treating infected people with effective drugs, larviciding areas where mosquitoes bred, and spraying the outdoors and the interiors of houses with the insecticide DDT, these groups managed to eradicate malaria from the United States by the early 1950s.

While we are now malaria-free in the United States, other areas of the world are not so lucky. Malaria is the biggest global killer of children. Sub-Saharan Africa in particular bears the brunt of the malaria death toll of one to two million people a year, 90 percent of whom are pregnant women or children under the age of five. As Dr. Wen Kilama, Chairman of the Malaria Foundation International puts it, "The malaria epidemic is like loading up seven Boeing 747 airliners each day, then deliberately crashing them into Mt. Kilimanjaro."

Malaria not only slaughters African children. It also perpetuates the cycle of poverty, much as malaria kept the American South poor until its eradication. Malaria probably costs Africa 1.2 percent of its GDP, or about $12 billion, every year (the equivalent for the U.S. would be about $135 billion a year).

According to the World Health Organization (WHO), malaria rates have increased about 10 percent in the past few years—at a time when the 12-year Roll Back Malaria initiative to halve malaria rates worldwide is approaching its halfway point. The initiative—whose main funder is the U.S—is failing.

CDC/Jim Gathany

Fortunately, some African countries are enacting comprehensive malaria control programs much like those that helped eradicate malaria from the United States. These successful programs are grounded in the idea that effective malaria control employs every tool that science has provided.

South Africa has had such a program for over 50 years. South Africa depends upon a combination of low-level, controlled indoor insecticide use and prompt treatment of malaria cases to keep malaria incidence low (bed nets and reducing mosquito breeding sources are also employed in a limited way).

This insecticide use is vastly different from the widespread spraying from the backs of trucks or agricultural spraying from aircraft that we saw in the 1950s and 1960s. Indoor residual spraying (IRS) involves the application of a small amount of insecticide on the interior walls and under the eaves of a house.

In 1996, South Africa's Department of Health decided to replace the insecticide it had used for 50 years, DDT, with synthetic pyrethroid insecticides. However, largely because agriculture uses synthetic pyrethroid insecticides, insecticide resistance soon became a problem. What followed was one of the worst malaria epidemics in the country's history. Malaria cases rose from around 6000 in 1995 to over 60,000 in 2000.

Led by the South African Government, negotiators for the Stockholm Convention on Persistent Organic Pollutants—also known as the POPs treaty—agreed in 2000 that DDT could still be used for disease control. South Africa reintroduced DDT to malaria control in KwaZulu Natal Province, the province worst hit by the epidemic. In 2001, South Africa introduced a new anti-malaria drug, Coartem, an artemisinin-based combination therapy, to treat malaria patients. The combination of insecticides and drugs caused malaria

cases to fall by almost 80 percent by the end of 2001.

In the early 1980s, Zambia, one of the poorest countries in Africa, discontinued its insecticide spraying program, due largely to financial constraints. As a result, the incidence of malaria cases nearly tripled, from approximately 120/1000 population in the late 1970s to over 330/1000 in the late 1990s.

However, in 2000, a privately funded malaria control program in the Zambian Copperbelt began using DDT. It protects a population of approximately 360,000 at a cost of $6 per household (in a region with approximately 11 residents per house). After just one spraying season, malaria cases declined by 50 percent. Today, case rates are down 80 percent since the inception of the program, with mortality rates reduced even further since the introduction of newer and better drugs. Zambia has now implemented DDT and pyrethroid IRS programs in other parts of the country with equally good results.

Inexplicably, most international aid organizations resolutely refuse to fund comprehensive malaria control programs like those in South Africa and Zambia. Responding to pressure from malaria specialists and critical media coverage of its previous funding allocation, The Global Fund to Fight HIV/AIDS, Malaria, and Tuberculosis is the only international public donor to provide even marginal support for DDT and effective drugs to combat malaria.

I am sad to say that one offender is the U.S. Agency for International Development (USAID). Not only does USAID resist funding some of the most effective interventions, but it wields its great influence throughout the international public health community to discourage support of these interventions by the Global Fund, the United Nations, and by individual country malaria programs who know that USAID is their main donor.

Despite the obvious benefits of comprehensive malaria control programs, by its own admission, "USAID typically does not purchase drugs or medicines other than in exceptional or emergency circumstances for any of our programs" and "IRS is not a major focus of our programs."

In 2003, USAID received a Congressional allocation of $65 million dollars. As USAID's money does not go to the purchase of antimalarial drugs or to funding indoor spraying, one would hope that some goes to the purchase and distribution of bed nets. Some does, about $ 4.2 million of it, but USAID's net distribution program often flies into the face of economic realities in African countries by charging for nets. Most people in Africa cannot afford to purchase bed nets, even at cost. Thus most countries in Africa try to heavily subsidize the purchase of the nets or distribute them for free.

Still, this is only $4.2 million out of $65 million. Of that, USAID asserts that it spends 28 percent on the prevention of infection. $4.2 million is a bit short of 28 percent of $65 million—so where does the rest of the money go? It goes to local country contractors, presumably for education, distribution, and capacity building. When Africa Fighting Malaria asked how the contractors spend the money, USAID headquarters said they did not have access to that information. When asked how that information could be obtained, USAID did not even bother to reply. On September 14, Sens. Judd Gregg (R.-N.H.) and Russell Feingold (D-Wis.) asked the General Accounting Office to investigate USAID's malaria program, since transparency is so low.

Congress needs to spend money on combating malaria in Africa, but it also needs to assure that that money is being effectively utilized. As sufficiently compelling as the humanitarian reasons are, malaria in Africa also affects the United States' national interests.

First, as U.S. Marines' experience a year ago in Liberia attests (22 percent contracted malaria), U.S. troops are at a distinct disadvantage when entering a combat zone that is also a malarial area.

Second, like AIDS, with which malaria is often found in deadly tandem, malaria is a destabilizing disease. By sapping the strength of adults, by compromising the educational development of school-aged children, and by killing young children, malaria severely retards the economic development of African countries, creating poverty and despair in its wake, and countries beset by poverty and despair are more prone to political instability than those that are not.

Finally, malaria cases in the U.S. have primarily been imported in recent decades, but last year, an outbreak in Florida could not be traced to any traveler. This disturbing incident suggests that the U.S. could be on its way to welcoming this deadly disease back to its homeland.

Mosquito-borne disease will continue to threaten the United States. The U.S. simply cannot close its borders to all international trade, travel, and immigration and it is through such routes that new vectors and new diseases, such as West Nile Virus, have made their way here, and it is the way that old diseases, such as malaria, will re-establish themselves here.

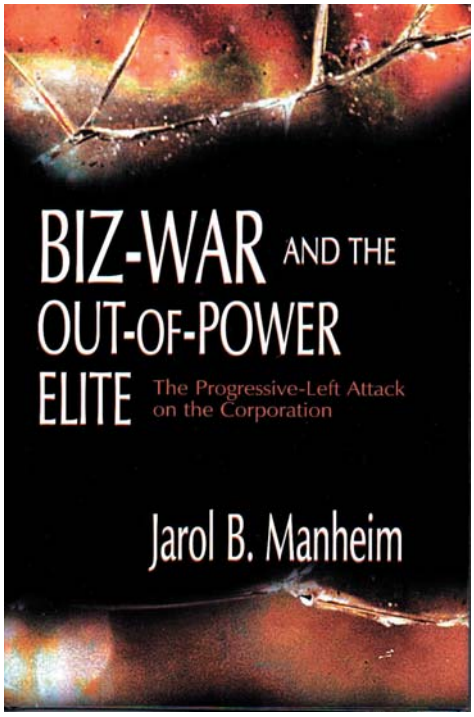
The best way to prevent malaria from threatening U.S. interests both at home and abroad is to combat malaria where it is found by helping to fund effective, comprehensive malarial control programs.

Biz-War and the Out-Of-Power Elites: The Progressive-Left Attack on the Corporation

by Prof. Jarol B. Manheim, George Washington University

(Lawrence Erlbaum Assoc., March 2004, $34.50; 216 pages)

Reviewed by Neil Hrab



Citigroup, America's largest financial institution, announced earlier this year that it was giving in to demands by the environmental activist group Rainforest Action Network (RAN) to stop funding projects that RAN claimed were harming the environment. RAN's four-year campaign against Citigroup involved campus student rallies and boycotts, anti-Citigroup TV ads, street protests, and even banner hangings in front of Citigroup's New York headquarters. To a casual observer, this might seem like a spontaneous grassroots movement spurred by concern over a financial giant's business practices. But, as a valuable new book makes clear, nothing could be farther from the truth.

In his new book, *Biz-War and the Out-of-Power Elites: The Progressive-Left Attack on the Corporation*, Jarol Manheim, professor of media and public affairs and political science at the George Washington University in Washington, D.C., documents the rise of the new anti-corporate Left (or progressives, as they now prefer to be called). The book looks closely at the ideology, organizing strategies, and communications tactics that liberal activists are using to challenge both this country's business elite, as well as politically ascendant conservatives.

Prof. Manheim notes that his analysis is not concerned with ideology. His aim is not to analyze "the colorful philosophical banners around which true believers rally," but to study the "strategies and tactics employed by their leaders to attract and mobilize them."

Manheim begins his analysis with the 1980s Reagan Revolution, which he considers crucial to *Biz-War*'s story, because it precipitated the fall of a once-hegemonic American liberalism. Some of the liberals who survived the rout began to cast about for ways to take back power. One such survivor group was organized labor, integral to the New Deal coalition that Ronald Reagan shattered. Another was a network of wealthy young liberal philanthropists who, as early as 1981 (as Manheim documents), began to look for ways in which the Left could rebuild.

First, the survivors set out to craft a "guiding empirical theory of social, political, and economic organization" to replace the liberalism that Reagan overthrew. A big part of this theory is an anti-business propaganda tool called "corporate social responsibility" (CSR). They also set out to build a new "institutional counterstructure" from which they could attack their conservative foes. Manheim pays due attention to the rise of ideological leftist foundations like the Threshold and Tides Foundations, which fund the groups that comprise this "counterstructure." Threshold has provided funding for such far-left outfits like the Ruckus Society, Friends of the Earth, Mobilization for Global Justice, and International Labor Rights Fund. Tides has helped launch groups such as the International Rivers Network and the Institute for Global Communication.

To assure some minimal unity among its various factions, the reconstituted Left settled on an identifiable and easily demonized "enemy" figure: private, for-profit American corporations, which Manheim describes as "the perfect foil" for the Left's agenda. This is because corporations "determine the scale, nature, and quality of employment; the types of goods and services that are produced...; the form and extent of the exploitation of natural resources, and the balance between economic production and environmental quality; and other similarly significant outcomes...[P]recisely because they are the repository of so much economic, political and social authority, they are widely distrusted, disliked, and in some quarters even reviled." For liberals attempting to rise, phoenix-like, from the ashes of the New Deal coalition's collapse, "[c]orporations are the perfect enemy."

Finally, this new anti-corporate movement crafted tactics of political confrontation, articulated in the rise of radical, tax-exempt environmentalist groups like the aggressive Rainforest Action Network, which is now trying to duplicate its successful, boldly disruptive anti-Citibank tactics in campaigns against other banks. During the summer of 2004, RAN launched its "BBQ the Banks" campaign, designed to turn up the heat on "The Liquidators," or "America's most environmentally destructive banks." The activists at

these events shouted questions at bank executives—while grilling tofu—in an effort to shame these executives into becoming more "eco-friendly." (Manheim's previous book, *The Death of a Thousand Cuts*, provides an excellent survey of the tactics used by groups like RAN.)

Biz-War explains how the new liberal Left—a loose alliance of liberal foundations, labor unions, religious activists, environmentalists, activist pension funds, and CSR boosters—came together to take back the power and authority they believed was unjustly taken from them by the Reagan Revolution. It also provides a picture of the activists, organizers, and various tax-exempt institutions involved. The analyses of the aforementioned Tides and Threshold Foundations are particularly insightful.

The book looks not only at the evolution of the post-Reagan Left, but also at the little-known history of how the movement revitalized itself. The Left's revival, Manheim notes, "was not the result of a single decision by some maximum leader or leadership cabal... Rather, it was a bit of a messy process... [first,] key individuals and groups on the Left struggled for a time to overcome their shock at what had befallen them... Coming from a variety of directions and with varying pace, the policy activists, the ideologues, the social philanthropists, and the altruists who compose what we now think of as the Progressive Left slowly converged on their new language and on the strategy it opened up for rebuilding their movement."

While the anti-corporate Left may have evolved into its current form without any central direction, in recent years it has been remarkably well-coordinated in the pursuit of its goals. Anyone who wants to understand the ferocious campaigns now being conducted by liberal and left-wing groups against corporations should read this book.

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Meet CEI's Experts: **Hans Bader**

Hans Bader, CEI's Counsel for Special Projects, joined CEI in 2003, His prior casework has included suits involving the First Amendment, federalism, and civil rights issues. Hans graduated from the University of Virginia with a B.A. in economics and history, and later earned his J.D. from Harvard Law School. Just before joining CEI, he was Senior Counsel at the Center for Individual Rights. The editors of *Monthly Planet* recently asked Hans to tell us more about himself.

How did you become interested in cases dealing with the issue of federalism?

While at a prior employer, the Center for Individual Rights, I worked on cases limiting the reach of federal power. One stopped the Justice Department from using the Voting Rights Act to force a Louisiana school board that already had black members to create racially gerrymandered districts. The other invalidated a Violence Against Women Act provision that federalized domestic violence cases, treating them as "civil rights" violations. The Supreme Court held the provision exceeded Congress's power under the Commerce Clause and the Fourteenth Amendment. While working on these cases, I saw how the blurring of lines between state and federal governments promotes silly laws and a lack of accountability.

What do you believe is the biggest difference between public interest law and private practice?

Working in public interest law gives you more discretion to pursue interesting cases and avoid disagreeable clients.

Where could you be found when not at CEI?

At home or with family. Even when I travel, I typically stay with family members, such as my wife's family in Nice, France. I spend a lot of time reading, especially constitutional cases and history books.

Do you have any advice for someone considering entering law school?

Don't go to law school to make a lot of money. If money is what interests you, become an investment banker instead.

Why the United States Should Remove Its Signature from the Kyoto Protocol

by Christopher C. Horner and Iain Murray

On March 29, 2001, just over two months into his new administration, President Bush announced that the United States would not comply with the Kyoto Protocol on climate change, which would have led to energy rationing due to its required cuts in carbon emissions, the inescapable byproduct of energy generation. The President made clear his opposition to the unreasonable demands the Kyoto Protocol places on the United States. "We will not do anything that harms our economy," he said then.

However, over three years later, the Clinton-era signature remains on this potentially very harmful document. The Bush Administration should move to unsign it.

The continued presence of America's signature on the Kyoto treaty sends the wrong signal. Sensing ambiguity in the U.S. position, European officials continue to press Kyoto's case, and are placing immense diplomatic pressure on Russia to ratify, which would bring the Protocol into legal effect, since it would push Kyoto over the necessary threshold of 55 percent of the world's greenhouse gas emissions. This carries considerable risks.

When in Kyoto, do as in Rome

In May 2002, the Bush Administration announced it would "unsign"—that is, rescind the American signature from—the Treaty of Rome establishing an International Criminal Court, which would have exposed American military personnel to politically motivated charges of "war crimes" (potentially brought by such humanitarian stalwarts as the governments of Cuba, Iran, and Syria).

This begs the question: If the United States does not intend to ratify the Kyoto Protocol, why does it refuse to rescind its 1998 signature of it? Unsigning the Treaty of Rome belies the Bush Administration's claim that the United States, as a non-ratifying signatory, faces no consequences from the Kyoto Protocol.

The Bush Administration has not stated that the U.S. will comply with Kyoto—yet the failure to rescind our signature sends that same message to other countries' negotiators. Unsigning the Rome Treaty but not the Kyoto Protocol suggests that the U.S. intends to adopt Kyoto. This has emboldened the European Union (EU) to lobby Russia to seek the best deal it can while eventual ratification by a future U.S. Senate remains a possibility. Most major EU countries, recognizing that Russia holds all the cards right now, are willing to give Russia major concessions—and the possibility of American ratification places the pressure on Russia to ratify Kyoto first.

Invitation to Litigation

Once it is in effect, other countries will likely use Kyoto to beat up on the U.S.—a signatory—at various international fora, even without Senate ratification.

Recent litigation by state attorneys general against U.S. power generators and the Administration itself hint at future lawsuits: At least three law review articles have set forth how Third World plaintiffs can use the national signature on the protocol to sue, under the Alien Tort Claims Act and other statutes, over costs allegedly imposed on them by climate change. The EU is threatening the use of the World Trade Organization's Shrimp-Turtle precedent to make the case that our failure to match EU energy taxes is either an impermissible advantage ("eco-dumping") or an unfair trade barrier. The

The Bush Administration has not stated that the U.S. will comply with Kyoto—yet the failure to rescind our signature sends that same message to other countries' negotiators. Unsigning the Rome Treaty but not the Kyoto Protocol suggests that the U.S. intends to adopt Kyoto.

U.S. signature on the protocol invites such action.

Status Quo Makes No Sense

The 1972 Vienna Convention on Conventions (Title 18) delineates treaty interpretation, dealing specifically with the issue of a non-ratifying signatory state: "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty," until and unless "it shall have made its intention clear not to become a party to the treaty, or it has expressed its consent to be bound by the treaty." This is restated by the Law of Foreign Relations of the United States (§ 312 of the Restatement 3d). This is expressly why President Bush unsigned the Treaty of Rome.

That requirement is not satisfied by verbally disavowing a treaty, while at the same time maintaining one's signature and continuing to send delegations to ongoing negotiations. The Vienna Convention's withdrawal requirement is achieved only by filing an instrument rescinding the signature with the same body to which the signature was communicated.

The Solution

The Bush Administration should formally announce its intention to rescind the American signature on the Kyoto Protocol. The move would carry no risk. By formally doing what the American and global public believe he has already done, President Bush will surprise no one. And rescinding the signature will remove two possible risks. First, it will take Kyoto off the table and force the world to look again at the issues surrounding global warming alarmism. Second, it will much reduce the chance of litigation to force the U.S. to adopt Kyoto-style energy suppression policies regardless of the Administration's position.

Unsigning the Kyoto Protocol would be consistent with the President's correct approach to the Treaty of Rome and reiterate his Administration's willingness to defend American sovereignty and the Constitution against international pressure.

Christopher C. Horner (chornerc@cei.org) is a Senior Fellow at CEI and Counsel to the Cooler Heads Coalition. Iain Murray (imurray@cei.org) is a Senior Fellow at CEI, where he specializes in the debate over climate change and the use and abuse of science in the political process.

The Good, the Bad, and the Ugly

The Good: District Court Judge Rebuffs Software Trustbusters

On September 9, a federal judge ruled that Oracle Software could move forward in its attempt to take over PeopleSoft, another major software company, as the acquisition would not threaten competition in the software market.

For approximately 15 months, Oracle has been pursuing a hostile takeover of PeopleSoft, whose management has resisted the bid. Six months ago, the U. S. Justice Department and 10 states stepped in to stop the takeover bid, alleging that, because the market for high-end business software is limited to a few companies, an Oracle-PeopleSoft merger would give the resulting company a predominant position that would allow it to raise prices and stifle innovation. U.S. District Court Judge Vaughn Walker rejected that argument, and noted the awkwardness of the government's expansive definition of "high-function enterprise software," which includes 18 different elements describing features, function, and complexity. Disappointed with the decision, the government's lead attorney on the case, Assistant Attorney General R. Hewitt Pate, stated, "The department is considering its options." How about leaving the decision to PeopleSoft's shareholders?

This is a major victory not only for Oracle, but for other entrants in software market, shareholders, and consumers. "Financial analysts will tout this as a victory for shareholders, but this decision represents more," notes CEI technology counsel Braden Cox. "This is really a win for all consumers, because the court stops cold the government's attempt to use a novel theory of antitrust law to micromanage a dynamic technology market."

The Bad: British Tories Denounce Blair for Not Being Green Enough

With Great Britain poised to assume the presidency of the European Union (EU) and the chairmanship of the Group of 8 (G8) in 2005, Prime Minister Tony Blair is facing criticism from the Conservative opposition for his handling of the climate change issue—namely, that he is not doing enough to stop climate change.

PR Newswire Photo Service

In a September 13 speech to an environment forum, Conservative Party leader Michael Howard raised the global warming ante, accusing Blair of missing the opportunity to be an international leader in addressing climate change. He trotted out a list of items that the Conservatives would pursue if they were to come to power: reassert British leadership on the Kyoto Protocol, help create a global emissions trading market, renew the drive for a diverse renewable energy sector, and refocus on increased energy efficiency. Most importantly, however, would be encouraging the United States to join the battle against climate change, because: "Like the war on terror, or the drive for responsible free trade, climate change is an international issue that depends on international co-operation."

Prime Minister Blair has not really answered the attacks, but he has called climate change "the single biggest long-term problem we face." But, as CEI Senior Fellow Iain Murray notes, waving this climate alarmist me-too-ism will not help the Conservative opposition: "Margaret Thatcher called global warming alarmism 'a marvelous excuse for worldwide, supra-national socialism.' Her successor, Michael Howard, is all for that socialism. No wonder Tony Blair's not worried."

The Ugly: Greens Launch New Project to Scare Investors

In September, the Massachusetts-based non-profit Civil Society Institute and its affiliate Results for America (RFA) launched CookingYourNestEgg.org, a website intended to show investors in the nation's top 24 equity funds how global warming adversely impacts the value of their mutual fund shares. This site is only the latest ruse by green activists to force corporations to adopt a radical environmental agenda.

PR Newswire Photo Service

According to its Web site, The Civil Society Institute's goal is to focus "efforts on trying to bring the corporate community into compliance with the goals of inter-governmental panels on climate change." Corporations want to protect their image; therefore, "with the right amount of pressure placed in the right places," executives will reduce energy consumption and pollution. In a recent press release, it named 10 companies whose shareholder wealth is most jeopardized by global warming—most in the energy, oil, and automotive sectors. "We hope that concerned investors will peel back the layers of their mutual funds and then consider urging the funds to put pressure on corporations to deal with global warming financial risks," said Civil Society Institute President Pam Solo.

This campaign, is merely part of a larger movement, known as Corporate Social Responsibility (CSR), comprised largely of activist NGOs using their influence to affect how firms do business, often in contradiction to the firm's core mission of maximizing shareholder profits. "With the collapse of traditional socialism, corporations have become the unchallenged engine of economic growth. And that has led to efforts by interest groups of all types to piggyback their agendas onto the corporation," notes CEI President Fred Smith. "A new economic order based along CSR lines would empower activists and bureaucrats to plan for society as a whole. But that society would be poorer. Shifting the firm's attention to non-economic goals will stall economic progress, harming workers, consumers, and shareholders—in short, all of society."

Media Mentions

President Fred L. Smith explores the potential of online health care resources:

The hierarchic medical structure of the past...is rapidly being replaced by the noisier, but vastly more knowledgeable Web.

The Internet...has made it possible for victims of "rare" conditions to find ways to communicate with one another...While some argue we need government oversight of this profusion of speakers, the solution to bad information is not censorship but rather better information.

-The Washington Times, September 22

Adjunct Fellow Dr. Henry I. Miller investigates the perverse incentives retarding the development of new anti-viral vaccines:

Federal bureaucrats seem not to understand the concept of carrots and sticks. For example, the U.S. Centers for Disease Control and Prevention, the largest domestic purchaser of vaccines, uses its buying clout to compel deep discounts for purchases. Arbitrary and excessive regulation also blocks progress. Consider, for instance, the Food and Drug Administration's position on a vaccine to prevent meningitis C, a bacterial illness that infects thousands of Americans and kills hundreds each year. No state-of-the-art vaccine against this infectious disease is approved for use in the United States, although three excellent products are available in Canada and Europe. The safety and efficacy of these vaccines have been amply demonstrated... Yet the FDA refuses to recognize the foreign approvals.

-Los Angeles Times, September 21

Senior Fellow Iain Murray weighs charges of bias in media coverage of global warming:

A new study published in the journal *Global Environmental Change* argues that, by adhering to the journalistic standard of balance when reporting on global warming, prestigious American newspapers have introduced an "informational bias" into public discussion of the issue.

The authors...defined "balanced coverage" as "accounts [that] gave 'roughly equal attention' to the view that humans were contributing to global warming, and the other view that exclusively natural fluctuations could explain the Earth's temperature increase."

This is a crude distinction. Very few scientists...dispute the idea that anthropogenic contributions are warming the atmosphere to some degree. Prominent "skeptic" Patrick J. Michaels of the University of Virginia, for instance, is on record as saying that humans are warming the planet, but we know that the total increase in temperature will be small.

- Tech Central Station, September 16

Director of Air Quality Policy Ben Lieberman details New York City's air quality success story:

Preliminary data for June through August show that the New York Metropolitan area had only one day in violation of the federal smog standard that has been in effect since 1979. As recently as the 1980s, the city averaged 20 such bad air days each summer. Overall, longtime residents have probably never breathed summer air any cleaner than in 2004.

Motor vehicles are the single largest source of these smog-forming compounds, and they have gotten significantly cleaner since the 1970s. Strict federal emission limits for cars and trucks have more than compensated for the area's population growth and increases in both number of vehicles and total miles traveled. Area power plants, factories, and other businesses have also made a contribution by lowering emissions.

-The New York Post, September 15

Vice President for Policy Clyde Wayne Crews tracks the creeping internationalization of antitrust policy:

President Bush's bipartisan Antitrust Modernization Commission held its first meeting in July. But after 114 years, America's antitrust regulatory regime is overdue for burial, not botox. This comes on the heels of Europe's antitrust regulators nailing Microsoft's success, to the tune of €497 million ($612 million), for a dominance assailed as impermissible and constituting market abuse.

The Sherman Antitrust Act of 1890 was brought to us by John Sherman, the brother of the Civil War's General William Tecumseh Sherman. I've heard it joked that Sherman's March across the South did far less economic damage than his brother's century-plus march through the greater economy. Now John Sherman is marching across the globe.

-EU Reporter, September 13

Director of Risk and Environmental Policy Angela Logomasini warns of the threat to Constitutional procedure from a pending environmental treaty:

Congress is currently working on legislation that takes constitutional disregard to a new level. At issue is how to implement future changes to a yet-to-be-ratified treaty—the Convention on Persistent Organic Pollutants, known as the POPs Treaty. It imposes international bans on 12 chemicals and sets up a process for banning more chemicals in the future.

Initially, the administration supported legislation that would allow the Environmental Protection Agency to regulate only the 12 chemicals listed in the treaty after Senate ratification.

Unfortunately, the administration abandoned this principled stand last year to endorse a bill that would direct the EPA to implement any additions to the POPs list of bans without Senate ratification.

-National Review Online, September 7

Car-free Day Causes Traffic Headaches throughout Europe

On September 22, thousands of European cities and towns closed their streets to automobile traffic to celebrate the seventh annual car-free day—resulting in major traffic jams in large cities including Vienna and Athens. "The Environmental Ministry should be more interested in keeping traffic flowing than in causing increased noise and pollution by creating artificial traffic jams," complained a member of the Austrian Federal Economic Chamber. Only three cities in the U.S. took part in the festivities: Madison, Wisconsin; Decatur, Georgia; and Portland, Oregon.

...END NOTES

TSA Pays Up for Lost Luggage

The Transportation Security Administration (TSA) has agreed to pay more than $1.5 million to 15,000 passengers who have had their luggage lost or stolen since federal inspectors started handling baggage along with airline employees. Since June, more than 20 TSA baggage screeners have been charged with stealing from checked bags, reports *The New York Times*. The agency has processed 18,000 of 26,000 claims it has received. Perhaps some of the payment will come from loose change collected by TSA inspectors at airport security checkpoints, which screeners must submit to the TSA. According to *The Indianapolis Star*, the Indianapolis International Airport alone has collected $4,000 in neglected passenger money.

Adbusters Sues to Air its Ads

The opening salvo in the war for greater media democracy has been fired. On September 15, the anti-advertising activist group Adbusters sued Canada's biggest television broadcasters—CTV, CanWest Global, CBC, and CHUM—for refusing to air three of its advertisements. The Canadian government is also a defendant in the suit because it regulates airwaves. Canadian broadcasters have responded that airing spots entitled "Buy Nothing Day," "TV Turn-Off Week," and "cars are pigs" might be bad for business.

Interesting First Amendment Rulings in the States

On September 9, the New Hampshire state Supreme Court ruled unanimously that hurling a string of obscenities at someone over the phone does not necessarily constitute harassment. "We do not suggest the First Amendment gives one the unlimited right to annoy another, by speech or otherwise," affirmed the Court. "There are, however, many instances when, without breaching the peace, one may communicate with another with the possible intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek."...Meanwhile, the Florida Supreme Court upheld a Boca Raton city ban on upright crosses and Stars of David, since it doesn't place a "substantial burden" on religious practice, because it does not ban all religious symbols, only those that stand upright.

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