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The Power of Positive Drinking

Alcohol Labeling Rules' Constitutionality in Serious Question

by Ben Lieberman

Moderate consumption of alcoholic beverages reduces your risk of heart disease and increases your chances of living longer. The *New England Journal of Medicine*, *Journal of the American Medical Association*, and virtually every other major medical publication have said so in a multitude of studies. So has the federal government's *Dietary Guidelines for Americans*, as well as hundreds of newspaper and magazine articles and television news segments. Indeed, everyone has a First Amendment right to pass along this important and useful piece of health advice—with one big exception. The federal government still restricts any mention of health benefits by producers of alcoholic beverages on product labels and advertisements. CEI previously challenged the constitutionality of this policy in federal court. Although this initial effort was unsuccessful, we now have a great opportunity to try again.

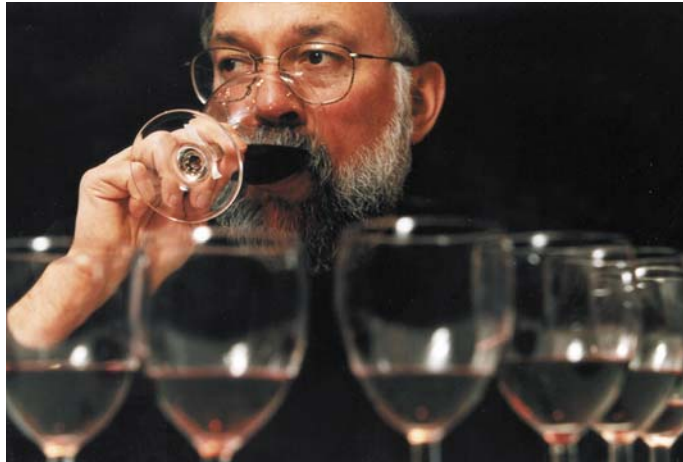
Last March, the Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB) published a rule entitled *Health Claims and Other Health-Related Statements in the Labeling and Advertising of Alcohol Beverages*. In the rule, TTB—which took over regulation of the alcoholic beverages industry from the Bureau of Alcohol, Tobacco and

Firearms (ATF) in 2002—codified the federal government's longstanding *de facto* ban on health information on labels or ads.

Back in 1993, ATF acknowledged that, "there is currently a growing body of scientific research and other data that seems to provide evidence that lower levels of drinking decrease the risk of death from coronary artery disease." However, ATF stated that it will forbid statements about this association on alcoholic beverage labels and ads, "unless they are properly qualified, present all sides of the issue, and outline the categories of individuals for whom any positive effects would be outweighed by numerous negative health effects." ATF conceded that it "considers it extremely unlikely that such a balanced claim would fit on a normal alcoholic beverage label."

In the nearly 10 years since ATF first set out its policy (now taken up by TTB), the evidence linking moderate drinking with reduced cardiovascular disease and overall mortality has only gotten stronger. Still, no substantive information has been allowed to appear on labels or ads. Among the statements ATF rejected was one that CEI submitted to the

Continued on page 3



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IN THIS ISSUE

Prospects for a More Peaceful World—Or Not?.....2	Clear the Decks.....8
The Power of Positive Drinking. (cont.).....3	The Good, the Bad, and the Ugly.....10
Whitman's Opportunity.....4	Media Mentions.....11
Q & A with Jonathan Adler.....6	End Notes.....12



FROM THE PRESIDENT

PROSPECTS FOR A MORE PEACEFUL WORLD—OR NOT?



by Fred L. Smith, Jr.

If one sought to place a Muslim country on the path to modernity one could scarcely do better than Iraq. But in Iraq, as elsewhere, the transition to democracy is one fraught with difficulty. Democracy prior to the establishment of a tolerant, open society can easily degenerate into majority tyranny and destructive wealth redistribution. So what is to be done?

The first step is to establish an open market economy. Iraq has the potential for rapid economic and technological growth but it must develop the prerequisites for that growth—a rule of law, secure private property, and enforceable contracts. Failing to provide the Iraqi people a stake in markets and tolerance would allow Islamic fundamentalists to create another tyrannical theocracy. Hernando De Soto, the Peruvian economist who has helped many people in the developing world gain legal title to their land, might well be encouraged to assist Iraq in the critical step of securing private property rights.

Iraq has many reasons to fragment. The Sunni minority has long exercised undue power and may well resist change. The southern Shia population might well wish revenge upon the Sunnis, and the Kurdish north has long been restive, striving for unity with other Kurdish regions outside Iraq.

Thankfully, these divisions point to their own solution—devolution of power from the central government in Baghdad to provinces and localities. A federal government with limited powers would enhance trust by reducing each group's fears that another ethnic group would capture national power and use it against the others. Further, a federal system would allow policy experimentation at the local and regional level. Opening up the Iraqi "laboratory of creativity" is as important to Iraq's future as the establishment of the federalist system was to America.

A cause for optimism is the dominant role of oil in the Iraqi economy. America knows how to manage a petroleum industry and can readily bring this vital resource into efficient management. There is, however, a risk that the future Iraqi government—like the past one—would seek state management of the oil industry. That would be a recipe for disaster, as the experiences of Mexico, Venezuela, and other petro-states demonstrate. State-run enterprises are rarely efficient. Further, the vast wealth flowing through such state bureaucracies is too tempting for fledgling civil servants. To divert Iraq's best and brightest into corrupt rent-seeking would be tragic.

America cannot prevent nationalization of the oil industry; however, the transitional team should create several oil companies along American lines, allocate the shares in these firms to the Iraqi people, and then allow the firms to partner with the world's private firms. French, German and Russian firms should be allowed to bid; after all, our goal should be a prosperous Iraq—not special deals for American firms. In contrast, a vigorous private oil sector in Iraq would serve as a model for privatization for other sectors of the economy. This war was not fought to make the world safe for capitalism or socialism. We should ensure that it is not.

The Iraqi war may or may not have been avoidable. But, having been waged, Iraq should be placed firmly on the path to an open market economy. The United Nations and other politicized bureaucracies should not be allowed to cripple that future. The world has slowly and painfully come to realize that wealth creation is no accident. A rule of law, respect for contracts, and limited government are all very complex achievements, as illustrated by the failure of so many nations to establish any of these. Still, the course is clear, and America should not be deterred from it. A stable Iraq is important for global security. That stability is far more likely if Iraq is directed firmly into a limited government open market system.

I began this essay with the term "if" because in Iraq, America risks having crossed a crucial qualitative barrier in invading a nation that seemingly posed no immediate threat. Some argue that George W. Bush might become a Woodrow Wilson—a utopian determined to coerce the nations of the world into enlightenment. I doubt it. Nothing in his pre-September 11 days suggests that attitude. But September 11 did change the world. Rogue actors and terrorist groups have demonstrated their capabilities—and that may well justify cautious interventions. But whether that—or a poorly considered American imperialism—is our present path remains unclear.

Fred Lee Smith, Jr.

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Continued from page 1

agency as part of a 1995 petition for rulemaking: “[T]here is significant evidence that moderate consumption of alcoholic beverages may reduce the risk of heart disease.”

ATF had promised to conduct a rulemaking procedure then, but did not do so. The agency also failed to respond to CEI’s petition for rulemaking. So in 1996, CEI and Consumer Alert sued ATF in U.S. District Court, on behalf of consumers deprived of their right to see this information on product labels and ads. In

1999, while the case was still pending, ATF finally proposed its rule. The agency then argued that our case was not ripe for judicial review pending the outcome of the administrative proceedings. In 2001, District Court Judge Thomas Penfield Jackson agreed, and dismissed the case.

On March 3, 2003, TTB published its rule. Unfortunately, it effectively closes the door to health information on labels and ads. The agency will reject any substantive health claims that are not accompanied by detailed disclaimers and qualifying statements. TTB claims it is “protecting” consumers from information that may mislead them into detrimental drinking habits, but provided no evidence of the alleged misleading effect.

The rule restricts even so-called directional claims. In 1999, ATF approved the wine label statement, “the proud people who made this wine encourage you to consult your family doctor about the health effects of wine consumption,” and another statement referring consumers to the *Dietary Guidelines for Americans*. The agency categorized these statements as directional, in that they do not contain health information but merely direct consumers to third party sources. However, later that year, ATF stated that it would no longer approve directional claims pending the outcome of the rulemaking proceedings. Now the final rule forbids such statements unless accompanied by a disclaimer discouraging people from drinking for health reasons. As with the substantive claims, TTB’s concerns about the misleading effect of directional claims absent such disclaimers are completely unsupported. Indeed, the agency sponsored a study, conducted by the Department of Health and Human Services, that concluded in 1998 that directional claims do not mislead consumers. Nonetheless, TTB asserts that the public is better off not seeing succinct health-related substantive or directional statements on labels or ads.

In sum, virtually all past attempts by industry to put direct or indirect health information on product labels or ads will be foreclosed under the new rule, unless weighed down with caveats and disclaimers that make the overall message too wordy and undercut its meaning.

TTB’s policy is completely out of step with the law. Since 1976, the Supreme Court has accorded strong First Amendment protection to commercial speech. From lawyer advertising to tobacco signs, nearly 20 High Court decisions have upheld protection for such speech. It has extended this

protection to alcoholic beverages as well, upholding the First Amendment right to put percentage of alcohol content on beer labels in 1995 and the right of liquor stores to advertise prices in 1996. These decisions have also extended to product health information. The United States Court of Appeals for the District of Columbia Circuit has struck down several onerous Food and Drug Administration (FDA) bans on drug and dietary supplement information for reasons that make TTB’s new rule equally vulnerable.

In a recent Supreme Court commercial speech case, *Thompson v. Western States Medical Center* (2002), the Court struck down a FDA ban on advertising of compounded drugs. With regard to agency claims that the public needs to be protected from this information, the majority stated that, “we have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful information in order to prevent members of the public from making bad decisions with the information.”

Now that TTB’s rule is out and its position is final, we can once again raise the constitutionality of this policy. TTB’s unsupported speculation that informing the public about the health benefits of moderate drinking will harm them does not justify the suppression of speech. CEI plans to file this case in the near future, and will keep you informed as it develops.

Ben Lieberman (blieberman@cei.org) is Director of Clean Air Policy at CEI.

The evidence linking moderate drinking with reduced cardiovascular disease and overall mortality has only gotten stronger. Still, no substantive information has been allowed to appear on labels or ads.

The advertisement features a blue and white color scheme. At the top, the word "eclass" is written in a large, light blue font. Below it, the text reads: "Test your Enviromental IQ with CEI's new online eclass". The word "eclass" is repeated in a smaller, blue font with a mouse cursor icon pointing to it. At the bottom, the URL "http://www.cei.org/pages/eclass" is provided.



Whitman's Opportunity

The EPA Administrator Should Call State AGs' Bluff in CO₂ Suit

by Marlo Lewis, Jr.

Does the Clean Air Act (CAA) impose a "mandatory duty" on the Environmental Protection Agency (EPA) to regulate carbon dioxide (CO₂), the principal greenhouse gas targeted by the Kyoto Protocol?

"Yes," claim the attorneys general (AGs) of Connecticut, Massachusetts, Maine, New York, New Jersey, Rhode Island, and Washington in two recent notices of intent to sue EPA Administrator Christine Todd Whitman. In effect, the AGs claim that the Clean Air Act compels Whitman to implement the Kyoto Protocol—a non-ratified treaty.

However, far from it being EPA's duty to regulate CO₂, EPA has no authority to do so. The plain language, structure, and legislative history of the Clean Air Act demonstrate that Congress never delegated such power to EPA.

The AGs somehow miss the obvious. The CAA provides distinct grants of authority to administer specific programs for specific purposes. It authorizes EPA to administer a national ambient air quality standards program, a hazardous air pollutant program, a stratospheric ozone protection program, and so on. Nowhere does it even hint at

establishing a climate change prevention program. There is no subchapter, section, or even subsection on global climate change. The terms "greenhouse gas" and "greenhouse effect" do not appear anywhere in the Act.

Definitional Possibilities Don't Cut It

Lacking even vague statutory language to point to, the AGs build their case on "definitional possibilities" of words taken out of context—a notoriously poor guide to congressional intent. (See, for example, *FDA v. Brown & Williamson*, 2000, in which the Supreme Court struck down FDA regulation of cigarette sales and advertising, rejecting FDA's claim that cigarettes are "drug delivery devices" within the meaning of the Food, Drug, and Cosmetic Act.)

The AGs argue as follows:

1. CAA Section 302(g) defines "air pollutant" as "any...substance or matter which is emitted into or otherwise enters the ambient air." CO₂ fits that definition, and is, moreover, identified as an "air pollutant" in Section 103(g).
2. Sections 108 and 111 require EPA to "list" an air pollutant for regulatory action if the Administrator determines that it "may reasonably be anticipated to endanger public health and welfare."

3. The Bush Administration's *Climate Action Report 2002* projects adverse health and welfare impacts from CO₂-induced global warming, and EPA contributed to that report.
4. Hence, Administrator Whitman must initiate a rulemaking for CO₂.

The AGs' argument may seem like a tight chain of reasoning. In reality, it is mere wordplay, a sophomoric attempt to turn statutory construction into a game of "gotcha." No delegation of regulatory authority can be inferred from the fact that carbon dioxide meets an abstract definition of "air pollutant" that applies equally well to oxygen and water vapor. Indeed, the very text cited by the AGs—Section 103(g)—admonishes

EPA not to infer such authority. That provision concludes: "Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements." If *nothing* in Section 103(g) can authorize the imposition of control requirements, then the passing reference

therein to CO₂ as an "air pollutant" cannot do so.

As to the phrase "endanger public health and welfare," it proves too much. It applies equally well to many substances that EPA does not—and may not—regulate under Sections 108 and 111.

Section 108 gives EPA authority to set national ambient air quality standards (NAAQS), which determine allowable emission concentrations for certain pollutants. Section 111 gives EPA authority to set new source performance standards (NSPS), which determine allowable emission rates for certain pollutants from new stationary sources.

EPA regulates 53 ozone-depleting substances under Title VI of the CAA, and 189 hazardous air pollutants under Section 112. Such substances are emitted into the ambient air, and are believed to endanger public health and welfare. By the AGs' "definitional" logic, EPA could dispense with Title VI and Section 112 and just use Sections 108 and 111—a ridiculous proposition plainly at odds with congressional intent.

Congress amended the CAA and added Title VI and Section 112 precisely because existing authorities—including Sections 108 and 111—were unsuited to the tasks of controlling hazardous emissions and protecting stratospheric ozone. Congress would have to amend the Act again before EPA could implement a regulatory climate change prevention program.

Continued on next page

The plain language, structure, and legislative history of the Clean Air Act demonstrate that Congress never delegated such power to EPA.



Absurd Exercise in Futility

The AGs of Connecticut, Massachusetts, and Maine contend that EPA must begin the process of setting national ambient air quality standards for carbon dioxide. However, the NAAQS program, with its state-by-state implementation plans and county-by-county attainment and non-attainment designations, targets pollutants that vary regionally and even locally in their ambient concentrations. The NAAQS program has no rational application to a gas such as CO₂, which is well mixed throughout the global atmosphere.

Consider the possibilities. If EPA set a NAAQS for CO₂ above current atmospheric levels, then the entire country would be in attainment, even if U.S. hydrocarbon fuel consumption were to suddenly double. Conversely, if EPA set a NAAQS for CO₂ below current levels, the entire country would be out of attainment, even if all power plants, factories, and cars were to shut down. If EPA set a NAAQS for CO₂ at current levels, the entire country would be in attainment—but only temporarily. As soon as global concentrations increased, the whole country would be out of attainment, even if U.S. emissions miraculously fell to zero.

When certain words in a statute lead to results that are “absurd or futile,” or “plainly at variance with the policy of the legislation as a whole,” the Supreme Court follows the Act’s “policy” rather than the “literal words” [*United States v. American Trucking Assn*, 1939]. Attempting to fit CO₂ into the NAAQS regulatory structure would be an absurd exercise in futility, and plainly at variance with the Act’s policy of devising state-level remedies for local pollution problems—powerful evidence that when Congress enacted Section 108, it did not intend for EPA to regulate CO₂.

Flunking Legislative History

Legislative history also compels the conclusion that EPA may not regulate CO₂. When House and Senate conferees agreed on a final version of the 1990 CAA Amendments, they discarded Senate-passed language to make “global warming potential” a basis for regulation and establish CO₂ reduction as a national goal. Thus, when Congress last amended the CAA, it considered and rejected regulatory climate change prevention strategies. As the Supreme Court has stated: “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language” [*INS v. Cardozo-Fonseca*, 1983].

What about Section 111—does it obligate or allow Whitman to establish performance standards for CO₂ emissions from power plants? Not a chance. In the 105th, 106th, and 107th Congresses, Senator Patrick Leahy (D-Vt.) introduced legislation to amend Section 111 and set performance standards for CO₂ emissions from power plants. Each time the bill failed to attract even one co-sponsor. The AGs would have us believe Congress implicitly enacted the substance of

Leahy’s three-time losing amendment back in 1970—before global warming was a gleam in Al Gore’s eye. The phrase “laughed out of court” was invented for just such inanities.

Junk Science Doesn’t Cut it, Either

Has Whitman “determined” that carbon dioxide emissions endanger public health and welfare, as the AGs claim? The Bush Administration’s *Climate Action Report 2002* (CAR) is an alarmist document, and EPA contributed to it. However, the CAR’s scary climate scenarios are a rehash of the Clinton-Gore Administration’s report, *Climate Change Impacts on the United States* (CCIUS); and the Bush Administration, in response to litigation by the Competitive Enterprise Institute, Senator James Inhofe (R-Okla.), and others, agreed that the CCIU climate scenarios are “not policy positions or statements of the U.S. Government.”

Both the CAR and the CCIUS rely on two non-representative climate models—the “hottest” and “wettest” out of some 26 models available to Clinton-Gore officials. In addition, as Virginia State Climatologist Patrick Michaels discovered, and National Oceanic and Atmospheric Administration scientist Thomas Karl confirmed, the two underlying models—British and Canadian—could not reproduce past U.S. temperatures better than could a table of random numbers. Thus, the CAR flunks Federal Data Quality Act standards for utility and objectivity. Any rulemaking based upon it would be challengeable as arbitrary and capricious.

In any event, because the CAA provides no authority for regulatory climate strategies, EPA could not regulate CO₂ even if the CAR scenarios were based on credible science—which they are not—and did reflect U.S. Government policy—which they do not.

Whitman should take up the AGs’ challenge—to refute their arguments, and, by so doing, head off an era of anti-energy litigation.

Transparent Power Grab

It is not difficult to see what the AGs stand to gain if EPA were to classify carbon dioxide as a regulated pollutant. Instantly, tens of thousands of hitherto law-abiding and environmentally responsible businesses—indeed, all fossil fuel users—would become “polluters,” and be in potential violation of the CAA. Since states have primary responsibility for enforcing the CAA, the AGs’ prosecutorial domain would grow by orders of magnitude.

The AGs’ notices of intent to sue create a test of leadership for Administrator Whitman. They want to put her in a crossfire between President Bush, who opposes Kyoto, and the EPA career bureaucracy, which has long sought the power to regulate CO₂ in order to increase its control over the U.S. economy. Whitman should take up their challenge. The AGs have unwittingly handed her an opportunity to refute their arguments, and, by so doing, head off an era of anti-energy litigation.

Marlo Lewis (mlewis@cei.org) is a senior fellow at CEI.



Q & A with JONATHAN ADLER:

A Case Western Reserve University Law Professor—and CEI Alumnus—Talks About How a Return to Federalism Can Help Protect Both Property Rights and the Environment

Jonathan H. Adler, assistant law professor at Case Western Reserve University and contributing editor to National Review Online, recently spoke with CEI about federalism and its implications for environmental regulation. He argues that, by allowing states and localities to experiment with different policy approaches, we can achieve better environmental protection—at lower cost and with greater protection for private property rights. Adler’s books include Environmentalism at the Crossroads (editor) and Ecology, Liberty and Property. Professor Adler worked at CEI from 1991-2000, most recently as senior fellow in environmental studies. Many of his writings are available online at www.jhadler.net.



CEI: You have written several articles about the importance of federalism and its relevance to environmental concerns. How is federalism an important check on federal power? How is it applicable to modern environmental problems?

Adler: At its heart, federalism seeks to ensure limited government and protect individual liberty by dividing government power between the state and federal governments. As envisioned by our nation’s founders, the federal government would focus primarily on truly national concerns and foreign affairs, leaving most other concerns to state governments. State power, in turn, would be limited by interjurisdictional competition. If one state adopts unnecessarily burdensome or intrusive laws, it risks losing citizens and businesses to other states that have adopted more hospitable laws. When the federal government oversteps its constitutional bounds, and adopts a national “one-size-fits-all” policy in a given area, interjurisdictional competition declines and states become less responsive to the needs and wants of their citizens.

In the environmental context, federalism serves to encourage states to develop policies that advance

environmental protection without sacrificing economic vitality. If a state imposes undue regulatory burdens, businesses may relocate to other states. By the same token, if a state ignores environmental concerns, citizens may migrate elsewhere in search of a better quality of life. This competitive nature of federalism also fosters policy innovation as different states will experiment with meeting the environmental and economic preferences of their citizens in different ways. Like actors in the economic marketplace, states that develop the better approaches will benefit, prompting other states to follow suit.

CEI: You argue that state and local governments are usually in a better position to address environmental concerns arising from local land-use decisions and location-specific ecological conditions. If the evidence supports this argument, why do many in the legal scholarship community remain skeptical?

Adler: Most environmental problems are local or regional in nature. Even where two environmental problems appear similar, the specific conditions that cause or contribute to a given environmental problem are also largely regional or local in nature. For example, in addressing urban air

pollution, it matters whether a given area has a substantial industrial base or a relatively old automobile fleet. Addressing such concerns requires knowledge and understanding that is only accessible at the local level. Thus, as environmental concerns become more particular and complex, federal “one-size-fits-all” approaches become less able to deal with the problems in an acceptable fashion.

The argument that states are in a better position to address environmental concerns strikes many people as counterintuitive. The conventional wisdom holds that federal environmental regulations were adopted because states “failed” to protect the environment so federal intervention was necessary. The reality is more complex. In many instances, state environmental efforts preceded federal initiatives. The first state wetland regulations were adopted more than a decade before federal wetland regulations. The first federal automobile emission standards were adopted to preempt state air quality efforts. States were often well ahead of the federal government in adopting environmental regulatory measures. Likewise, if we allow state experimentation, I believe that states will be also well ahead of the federal government in embracing non-regulatory approaches to environmental concerns.

CEI: You note that states regularly adopt environmental measures that are more protective than the federal floor, but that existing federal programs obstruct and discourage reforming state laws or reassessing environmental priorities at the state level. Do federal regulatory authorities often view innovative state efforts as encroachment on their turf?

Adler: Federal regulatory agencies are typically very resistant to state experiments in environmental policy. This is important because some states have been quite innovative



in using property rights and market principles to advance environmental goals. Such experiments include the use of individual transferable quotas for fisheries; recognition of property rights in instream water flows so that environmental groups can purchase water rights from farmers to protect fish; and encouraging self-sufficiency in state park and forest systems. Such experiments illustrate that it is possible to have both *greater* environmental protection and *less* environmental regulation.

has grown up around it, the wholesale devolution of environmental programs to states and localities will be difficult. I have proposed the creation of a formal environmental waiver process, what I call “ecological forbearance,” much like the welfare waiver process that facilitated welfare reform. Under such a system, states would have the ability to seek exemptions from federal environmental mandates and regulations. This would enable states to experiment with new approaches to environmental protection and set environmental priorities in line

expansions of federal environmental regulations, yet such litigation will occur so long as activist groups seek tighter regulatory controls than are imposed by the political branches—Congress and the federal regulatory agencies. A perfect example is the lawsuit announced by several state attorneys general and environmental groups to try and force the EPA to regulate carbon dioxide and other greenhouse gases under the Clean Air Act. Such a measure would never pass in the current Congress, so activist groups are seeking to impose it through the courts. This is a particularly egregious case: The Clean Air Act doesn’t authorize EPA to regulate CO₂, so any judicial imposition of such a regulatory requirement would constitute a *de facto* rewriting of existing law.

The competitive nature of federalism fosters policy innovation as different states will experiment with meeting their citizens’ environmental and economic preferences in different ways. States that develop the better approaches will benefit, prompting other states to follow suit.

CEI: Which would you consider major examples of existing federal programs that have not worked as well as comparable state programs in cleaning up the environment? Could some be repealed immediately and have their functions taken over by the states?

Adler: The most obvious example is probably the federal Superfund program. Designed to facilitate the rapid cleanup of abandoned hazardous waste sites, this program has been plagued by excessive costs, long delays, and wasteful litigation. The federal experience with waste cleanup has been quite disastrous. Winston Porter of the Waste Policy Center has done research that shows that many states have developed programs that clean up waste sites more rapidly and at lower cost.

In this and in other areas there is an urgent need to decentralize control and responsibility for environmental programs, transferring obligations and authority to state and local governments. Given the extensive array of federal environmental regulations and the sprawling bureaucracy that

with local needs and concerns. Among other things, this approach would provide greater opportunities for the development and implementation of market-oriented and property-based approaches to environmental protection.

CEI: Recently, environmentalists have been turning to the courts to enact policy, with some success, as evidenced by their recent victories, including the reinstatement of President Clinton’s 58.5-million-acre roadless designation for national forests in many western states. Do you see this litigious trend continuing?

Adler: Environmentalist groups’ use of litigation to achieve policy goals they could not advance through the democratic process is nothing new. Beginning in the 1970s, environmentalists and other activist groups have turned to the courts to force political change. There may be more such litigation today because both the Bush Administration and the Congress are generally unsympathetic to massive

CEI: What implications does the debate over judicial nominee confirmations have for the future of environmental law?

Adler: Federal courts play an important role in the development and enforcement of environmental regulations by ensuring that federal agencies abide by their statutory mandates, explain the basis for their regulatory decisions, and obey constitutional limitations on federal power. For this reason, it is important to have federal judges who will enforce these legal requirements independent of their own policy preferences. Too often in the past, judges have seen fit to substitute their own policy preferences for those of elected officials and political appointees.

The debate over judicial confirmations has become needlessly politicized at a time when activist groups of all political stripes are seeking to use the courts to achieve policy goals that they could never get through the elected branches. In the environmental context, groups such as Earthjustice and Community Rights Counsel are seeking to impose an environmental litmus test on federal judicial nominees, opposing any nominees who have voted against what they consider the “pro-environment” position in a legal case. Such a results-oriented standard for judges would undermine the neutrality and impartiality of the federal judiciary.



Clear the Decks

The Feds are Taking Them Away

by Angela Logomasini

Federal regulators are poised to ban the most popular and affordable outdoor deck construction material—wood treated with the preservative chromated copper arsenate (CCA). Junk science has indicted CCA as toxic, despite the fact that consumers and builders have used CCA-treated wood—which resists rotting and pests—safely for decades.

On March 17, this author and CEI's Vice President for Communications, Jody Clarke, testified before the Consumer Product Safety Commission (CPSC) on an Environmental Working Group (EWG) petition to ban playground equipment made with CCA-treated wood. EWG filed the petition last year, which prompted the CPSC to study the issue. In a report released in February, CPSC staff claim that CCA-treated wood isn't safe for children because it contains trace levels of arsenic.

"You, and the Environmental Working Group, are scaring people—and it's completely unnecessary," Jody Clarke told the commissioners at the hearing. "As a mother, I am not worried about my son being exposed to the pressure-treated wood that our deck at home is made of, or to the playground equipment in our neighborhood."

Clarke is right. Despite media hype and CPSC claims, there isn't any evidence that CCA-treated wood has ever made a child sick from its normal use in playground equipment or decks.

Improper use, such as failing to follow label warnings that outlaw burning the wood, may cause acute symptoms such as stomachaches and vomiting. CPSC is claiming that exposure to the wood during childhood might increase lifetime cancer risks for lung or bladder cancer, which occur late in life. But it is more likely that any such risks are negligible.

CEI, in written comments to the commission, explained the problems with the CPSC's science and petitioned the agency to comply with the Data Quality Act. Passed in December 2000, this law requires government agencies to show that any information they disseminate meets standards maximizing "quality, objectivity, utility, and integrity." Office of Management and Budget guidelines for implementing the law demand that agencies use the "best peer reviewed science." Agencies are also expected to make their scientific processes as transparent as possible.

Mandated transparency is designed to afford the public and scientific organizations the opportunity to scrutinize the science and data to ensure that the findings are reasonable. Yet CPSC has not made available its data or even its peer review, raising concerns that it is not complying with the law.

There are cases in which agencies may withhold information, such as to comply with Freedom of Information Act exemptions to protect confidential business secrets and national security. It remains unclear as to whether CPSC can make those claims. In any case, if it does, it must conduct and document additional study and peer review to demonstrate to the public that its findings are sound. CPSC has not released any such documentation.

CPSC may also be in violation of sound science mandates. Employing the best science would reasonably demand that agencies apply studies correctly. CPSC based its conclusions on two National Research Council (NRC) reports (1999 and 2001), which the Environmental Protection Agency (EPA) used to develop its standard for arsenic in drinking water rule. These are peer-reviewed studies, but CPSC appears to have used the data inappropriately.

These studies assessed risks based on studies of Taiwanese

populations exposed for decades to relatively high levels of arsenic in drinking water. CPSC assumed that exposure to arsenic for a few years in childhood is equivalent to the same total exposure evenly distributed over a lifetime. However, the NRC (2001) report concluded that cancer risk increases disproportionately with years of exposure. In addition to

duration of exposure, exposure during old age might also be an important factor that increases risks, which would make low-level exposures during childhood largely irrelevant to the NRC findings.

There are also serious limitations to using the Taiwanese studies and data. The Taiwanese researchers attempted to determine at what level arsenic poses a risk based on arsenic levels in drinking water wells. Villages included several wells, with a wide range of arsenic levels. Researchers did not know who drank from which wells so they used median arsenic levels for each village. Hence, a village may have had excess cancers from one well that contained high levels of arsenic, but researchers assumed that the cancers resulted from exposures at a lower median level.

Because of these problems, the 1999 NRC report cautioned that these problems could produce misleading results if not considered when EPA conducted its risk assessment. The NRC also warned that its analysis "should not be interpreted as a formal risk assessment for arsenic in drinking water or as a recommendation on how the risk assessment should be performed. Rather it is presented only to illustrate points raised earlier in the chapter."

Despite media hype and CPSC claims, there isn't any evidence that CCA-treated wood has ever made a child sick from its normal use in playground equipment or decks.



When EPA's Science Advisory Board (SAB) reviewed the EPA risk assessment on drinking water, it reiterated the importance of *not* using the NRC report as a risk assessment, and that uncertainties in the data warranted caution because they could lead EPA to significantly overstate risks. The SAB expressed concern that EPA didn't follow those warnings, noting: "The agency may have taken the modeling activity of the NRC as prescriptive despite NRC comments about possible limitations."

The commission failed to address the data limitations noted by the NRC and the SAB. Instead, CPSC seems to have done the opposite: It assumed all the worst possible effects based on the NRC report without regard to NRC warning against such application of its report. In fact, CPSC decided to choose a potency factor for arsenic that it acknowledges is six to 56 times more potent than an already conservative standard that EPA used to set its drinking water standard.

CPSC's sloppy research will likely produce adverse repercussions. Said Clarke at the March 17 hearing: "Groups that support a ban on pressure-treated wood say children are the victims. The real victims are going to be the families, or anyone, who will end up paying 20 to 30 percent more for decks made out of an alternative—and inferior—product, and the wood processors who will be affected by any ban. You could run some people out of business and I think that's a shame."

The CPSC study is also likely to encourage local governments, daycare centers, and others to tear out playground equipment, which is what happened in Florida when lawmakers began toying with the idea of banning CCA in that state. Perhaps wealthy communities will be able to rebuild, but what about poorer communities? Will kids in poor, inner-city neighborhoods be better off without safe play areas?

And that's not all. CPSC junk science may also advance bans on residential uses of CCA. Last year EPA announced that it would ban certain residential uses, while asserting that it has not found any "unreasonable risk to the public or the environment." EPA indicated at the hearings that it would finalize this ban soon. But EPA's deliberations on CCA are not over. There is a high probability that the CPSC study will impact future EPA decisions. In particular, EPA may consider banning some non-residential uses of CCA-treated wood. It is currently considering whether to list CCA as a hazardous waste, which could greatly increase disposal costs.

Numerous individuals and businesses stand to lose from such additional regulations. Consider what the costs would be if CPSC actions build pressure for EPA to list CCA-treated wood as a hazardous waste. Disposal costs will rise for everyone from consumers to cities to small businesses. CPSC should not underestimate this possibility's likely adverse effects on safety.

Families may keep decks longer—even when the decks begin to deteriorate and become safety hazards—if both the costs of disposing the wood and building a new deck grow too high.

In addition, new decks constructed with alternatives may also pose safety hazards because alternative preservatives are corrosive to screws and nails. As a result, consumers that

mistakenly fail to use stainless steel screws and nails may see their new decks eventually collapse. CPSC didn't consider these potential safety perils. In fact, it didn't even consider whether the alternatives were more or less dangerous than CCA.

People could switch to plastic lumber or hard woods like cedar or redwood. Yet these options are cost-prohibitive for many families and communities, as they can double costs. In addition, regulators might want to consider whether they want federal policy to encourage harvesting of redwood forests.

CPSC is supposed to be the nation's consumer advocate. But if CPSC officials are serious about uncovering threats to consumer safety and choice, maybe it's time they looked in the mirror.

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The Good, the Bad, AND THE UGLY

The Good: Study Shows Middle Ages Were Warmer than Today

According to a new study by a team of Harvard University scientists, the Earth was much warmer during the Middle Ages than it is today. The study, a review of over 240 scientific studies covering 1,000 years of global climate history, shows that today's temperatures are not the warmest of the millennium—and are not producing the most extreme weather. It shows that the Earth experienced a Medieval Warm Period between the ninth and 14th centuries with global temperatures significantly higher than today. The study also shows that global temperatures cooled significantly during a “Little Ice Age” that began around 1300; and that the world began to warm again around 1900—but has yet to reach medieval temperatures.

The Harvard team examined findings from studies of “temperature proxies,” such as tree rings, ice cores, and historical accounts, which scientists use to estimate prevailing temperatures at sites around the world. Brendan Bell of the Sierra Club's Global Warming and Energy Program dismissed the study's findings. “We have indications that the science is there, and we do have global warming resulting from increasing human activities,” he told *CNSNews.com*. “Eight of the last 10 years have been the hottest on record.” But, says CEI Senior Fellow Chris Horner: “This new study merely affirms the obvious: Climate alarmism based on a few years' or even a century's data is sheer folly, reminding us again that geological cycles spanning millennia do not share the rush of agenda-driven scientists or activists.”

The Bad: Prosecutors Use Patriot Act to Shake Down PayPal

Recently, prosecutors—at both the state and federal level—have gone after online cash transfer service provider PayPal for alleged violations of the USA Patriot Act, the anti-terrorism surveillance law passed by Congress one month after the September 11, 2001 terrorist attacks. On March 28, a federal prosecutor in St. Louis, MO, accused PayPal of violating the Act's anti-money-laundering provisions for allowing the service to be used by individuals accessing offshore online gambling sites—even though PayPal stopped processing online gambling payments last November, after it was acquired by online auction giant eBay.

Raymond W. Gruender, U.S. District Attorney for the Eastern District of Missouri, offered a settlement plan: PayPal could settle all charges and claims if it turned over all gambling earnings, plus interest, for the nine-month period ending July 31, 2002. eBay said that PayPal's online gambling earnings for that period were less than the amount stated in Gruender's letter. This follows an August 2002 Assurance of Discontinuance and payment of \$200,000 from PayPal to the office of New York Attorney General Eliot Spitzer, who had threatened action against PayPal for processing online gambling payments.

“Assume, for a moment, that our law against gambling is justified,” notes Solveig Singleton, a Senior Policy Analyst with CEI's Project on Technology and Innovation. “PayPal is certainly less involved in the wrongful transaction than those who actually gambled. But civil forfeiture means that prosecutorial discretion will be directed not at the actual wrongdoers (under our assumption, gamblers or gambling businesses), but businesses caught up with them because they offer services to everyone without inquiries into the exact nature of their business.”

THE UGLY: GREENS DEFEND ENVIRONMENTAL HAMSTRINGS ON MILITARY

A coalition of 12 radical environmentalist groups is opposing proposed revisions to environmental laws that the Department of Defense says are encroaching upon military training areas. On March 31, the Center for Biological Diversity, Center for Public Environmental Oversight, Defenders of Wildlife, Earthjustice, Endangered Species Coalition, Oceana, Military Toxics Project, National Environmental Trust, National Wildlife Federation, Natural Resources Defense Council (NRDC), Public Employees for Environmental Responsibility, and U.S. Public Interest Research Group issued a joint statement blasting legislation to ease environmental restrictions on military lands as comprising “sweeping, unwarranted exemptions from five major laws safeguarding public health and wildlife.”

The Encroachment on Military Bases Prevention Act (H.R. 1235), introduced by Reps. Elton Gallegly (R-Calif.) and James Gibbons (R-Nev.), would exempt the Department of Defense from some regulations under the Endangered Species Act; Clean Air Act; Resource Conservation and Recovery Act; Comprehensive Environmental Response, Compensation, and Liability Act; and Marine Mammal Protection Act that have set off large expanses of military land off-limits to combat training. NRDC says it favors “case-by-case exemptions” that put the burden of proof on the military. But for the military, case-by-case exemptions are a bureaucratic nightmare: Over 300 federally protected plant and animal species live on military land.

A GAO report from last year noted that, “[h]abitat considerations restrict maneuvers and off-road vehicle training” at Fort Lewis in Washington state. GAO also noted: “Because of environmental restrictions, Navy Special Warfare units can no longer practice immediate action drills on Coronado beaches,” at Special Operations Command in California. To make matters worse, a pending NRDC lawsuit could restrict activity on 56 percent of Camp Pendleton in California. In a recent letter published in the *Wall Street Journal*, CEI Adjunct Fellow Henry I. Miller notes: “It should come as no surprise, then, that accidents and mishaps resulting from insufficient training and battlefield-simulation exercises have been so numerous in Afghanistan and Iraq.”



Director of Clean Air Policy Ben Lieberman explains Congress' role in creating higher gas prices:

So far, 2003 has been a rough year for America's motorists. Labor unrest in Venezuela and uncertainty about Iraq sent the average price of gasoline up 35 cents since Jan. 1.

Fortunately, those problems are being resolved and prices are slowly falling. But before we see a return to early-year levels, we'll have to face the next big threat to affordable gas—summer.

And rather than help, Congress is taking steps that may exacerbate the risk of future summertime jumps at the pumps.

- *Investor's Business Daily*, April 30

President Fred L. Smith, Jr. explains the problems with extending U.S. regulatory requirements to foreign airlines:

After the tragedies of 9/11, America rushed to federalize airport security, creating the Transportation Security Administration (TSA), also affectionately known as "thousands standing around." Whether the path to safer skies had to run through Washington remains unclear. Nonetheless, given the vast sums spent, America's skies are likely somewhat more secure—at least from terrorists operating in the 9/11 fashion. Now, based on the argument that a global air-travel system is no safer than its weakest link, the TSA wishes to export its rules to foreign carriers. That would be a mistake.

America is rich and can be wasteful in air-travel security. Most nations cannot. The TSA's motto is, "The power to secure, the passion to serve!" But the TSA, like most precautionary agencies, is too often more passionate than rational, acting at times as if safer skies could best be achieved by making America a no-fly zone. Vast sums have been spent equipping airports with more detection gear than high-tech hospitals; but some of this equipment works poorly. Moreover, TSA security rules are often symbolic and always politically correct. Thus, profiling remains questionable while the elderly line up for body searches.

- *USA Today*, April 7

Senior Fellow Christopher C. Horner warns of alarming climate policies coming from the U.S. Senate:

Little is more insulting these days than an accusation of French sensibilities. Sometimes, however, the *chaussure* simply fits, and rarely better than in analogy to the "climate change" title of the just-completed "staff draft" Senate energy bill. It does contain some sensible proposals to provide the conditions so that private capital can be attracted to rebuild and enlarge the energy infrastructure, provide more access to some of our energy resources on federal land, and for once omitted any renewable portfolio standard. But Kyoto Joe Lieberman, D-Conn., and his cohorts didn't even have to



go through Belgium for their "climate change" spoils, merely the Republican-run Energy Committee. This may be by now predictable, yet it remains deeply disappointing, and politically and economically inane.

- *The Business Press*, April 7

Technology Counsel Braden Cox argues the case for keeping the Internet a no-sales tax zone:

Contrary to popular belief, federal law doesn't prohibit all Internet taxation. It merely prohibits states and localities from imposing multiple and discriminatory taxes on Internet sales and prevents states from imposing taxes on Internet access. States are therefore free to impose taxes on goods purchased through the Internet.

[Illinois State Sen. Steve]

Rauschenberger has seized on this opportunity and has been working with a task force of the National Conference of State Legislators. The legislators drafted model legislation for states to collectively streamline and simplify their sales- and use-tax systems to make it more "e-commerce friendly."

With more than 7,000 taxing jurisdictions nationwide... streamlining and increased efficiency is desirable. But the current system has been in place for decades, so what is the real impetus?

Answer: a new tax on e-commerce, just at the time when most state budgets are deeply in the red. Illinois alone is facing a two-year deficit variously estimated between \$7 billion and \$10 billion.

- *Chicago Sun-Times*, March 31

General Counsel Sam Kazman weighs the perils of over-caution in the drug approval process:

Even by Capitol Hill's standards, last Tuesday's press conference was an exceptionally self-congratulatory event. The occasion was the unveiling of the Pediatric Research Equity Bill (S. 650) by a bipartisan group of senators...

Last fall a federal court had ruled that the Food and Drug Administration (FDA) lacked the authority to mandate that pharmaceutical manufacturers test on what are known as "off-label" uses in children. This group intended to give FDA that authority. What could conceivably be wrong with that?

Having more data on drugs sounds wonderful, but there's a trade-off between developing more data and developing more drugs. FDA's drug-approval process is already incredibly long and cumbersome; on average, it takes about 15 years and \$800 million to bring a new drug to market. While some argue that FDA is approving drugs too quickly, that view isn't shared by the medical profession. A poll of oncologists released last year found that over 60 percent believe FDA is too slow in approving new therapies.

- *The Hill*, March 25



North American Pollution Levels Drop, Study Shows

Environmental pollution in North America dropped by five percent from 1995 to 2000, according to a new study by the Commission for Environmental Cooperation set up under the North American Free Trade Agreement. The authors of the report, *Taking Stock 2000: North American Pollutant Releases and Transfers*, found a 32 percent increase in pollution from smaller enterprises—those reporting less than 110 tons annually—but also a 7 percent decline from larger industries—those reporting at least 110 tons annually—which account for about nine-tenths of all pollution reported. The study covers industries in the United States and Canada, with companies in Mexico starting to report voluntarily.

Judge: File-Swapping Tools Legal. Music Labels Turn to Technology

On April 25, a Los Angeles federal judge ruled that StreamCast, parent of Morpheus software, and Grokster were not liable for copyright infringements carried out by people using their file sharing software. “Defendants distribute and support software, the users of which can and do choose to employ it for both lawful and unlawful ends,” wrote Judge Stephen Wilson in his opinion. “Grokster and StreamCast are not significantly different from companies that sell home video recorders or copy machines, both of which can be and are used to infringe copyrights.” Meanwhile, the *New York Times* reports that major music labels are financing the

...END NOTES



development of software to prevent unauthorized file copying, ranging from programs that redirect users to a website where they can purchase the recording they are looking for to programs that freeze up computers trying to download files.

In Other News...

A textbook review in California has determined that many textbooks used in the state will no longer feature pictures of hot dogs, sodas, cakes, butter, and other foods not considered nutritious.....Let’s hope that California lawmakers don’t get any ideas from New Zealand, where public health officials have proposed

banning the sale of “junk food” to minors.....Don Gorske of Fond Du Lac, Wisconsin, recently ate his 19,000th Big Mac, adding to his Guinness world record. Gorske, 49, who says he eats nothing but Big Macs and drinks little besides Coca Cola, is six foot tall and weighs only 180 pounds. He said he had a piece of pizza recently, but it “just wasn’t the same.”... Georgia state Rep. John Noel (D-Atlanta) introduced a bill to make it a misdemeanor “of a high and aggravated nature” for any restaurant not to offer sweet iced tea. Noel acknowledged that the proposal was an attempt to bring some humor to the legislature, but said he wouldn’t mind if his bill became law. He says he got the idea for the bill when he wasn’t able to order sweet tea at a restaurant in Chicago.....A new Seattle police “zero tolerance” anti-crime initiative is targeting jaywalkers, according to the *Seattle Post-Intelligencer*, which reports that one afternoon police handed out about a dozen jaywalking citations within two hours.....



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