Executive Summary

Former Senator George McGovern was correct when he characterized many government regulations as "needlessly complicated and needlessly burdensome." If Senator McGovern can recognize the failings of a baroque federal regulatory regime that he helped construct, surely it is time to move beyond politics and begin reining in the regulatory state.

The following ten case studies in regulatory abuse are identified and explained by experts who not only describe the problem, but propose solutions. In each case, some action should be undertaken by Congress to repeal the regulation or clarify congressional intent. Make no mistake about it: it is the duty of Congress to write clear legislation that does not lend itself to the kind of bureaucratic abuses described in this report, and it is Congress' duty to rein in regulators who abuse their authority. Congress' "Corrections Day Calendar" would be an ideal vehicle for the correction of these ten regulatory problems:

Labor Department Promotion of "Social Investing"

When President Clinton was Governor of Arkansas, he required at least 5 percent of state pension funds be invested in "economically targeted investments" that are significantly riskier and less liquid than other investments, and that underperform other investments by an average of two percentage points per year. Now, the U.S. Labor Department is at it, with a 1994 Interpretive Bulletin that opens the door for the federal government to begin directing pension funds for political purposes.

"Congress' 'Corrections Day Calendar' would be an ideal vehicle for the correction of these ten regulatory problems"

Attempted Environmental Crimes

Courts have ruled that a person can be convicted of an environmental crime without the burden of proving intent. Even worse, Attorney General Janet Reno's "Environmental Crimes and Enforcement Act of 1996" puts the burden of proof on the defendant to prove that he or she did not have intent. This was the logic behind the prosecution *and conviction* of Indy race car driver Bobby Unser for crossing into a federally-protected wilderness area during a blinding snowstorm, despite lack of any proof that he had done so, and without demonstrating intent on Mr. Unser's part.

The Americans With Disabilities Act (ADA): Hurting the Disabled

The ADA simply hasn't worked for the seriously disabled, and has justified the concerns of those who warned that the law would generate abuses, according to a Commissioner of the U.S. Commission on Civil Rights. Absurd or outrageous court cases have twisted the intent of the ADA, resulting in a kind of "Americans with Minor Disabilities Act" that works against the major intent of the ADA: insuring that seriously disabled persons are not discriminated against in hiring decisions.

Bilingual Education: Federal Regulations Against Learning English

Californians recently voted resoundingly to reject bilingual education and its thirty-year record of failure. And no wonder. Only 7 percent of California's 1.3 million "Limited English Proficient" students graduated back into mainstream classes each year. But the U.S. Department of Education's Office of Civil Rights has negotiated compliance agreements with schools across the country that are strongly biased in favor of retaining bilingual education, and threaten to withhold federal funding for education. The English Language Fluency Act, if enacted, would eliminate all of these compliance agreements, and would thus remove barriers to the prompt learning of English in America's schools.

Sludge Magic: EPA Regulations Help Spread E. coli

A research microbiologist for the EPA's Ecosystems Research Division claims that the EPA's 1993 "sludge rule" on land application of municipal wastes may be the most scientifically unsound action ever taken by the agency. The sludge rule and its history suggest that agency regulations are often based on political expediency, not sound science, and thus call into question many of EPA's policies.

The Sugar Program's Bitter Harvest

The U.S. sugar subsidy program has long been criticized as an anti-consumer boondoggle that protects a handful of politically-astute sugar producers, but the sugar program has also caused "ecological mayhem" by distorting the marketplace. Subsidized sugar plantations, which would be uneconomical without the subsidies, have choked Florida's Everglades with phosphorous run-off, causing serious harm to many Everglades species. Now Congress is spending $300 million to clean up the environmental mess caused by Congress' own subsidy of domestic sugar producers.

The FCC's Universal Service Program

An obsolete remnant of vintage 1930's telecom regulation, the FCC's Universal Service Program (USP) has run its course and should be eliminated. But in a case study of the danger of not sunsetting completed government programs, the USP has risen from the dead and has become a platform for new and increasing taxes on consumers, most recently the e-Rate or "Gore Tax" on telephone service.

26 U.S.C. 923 (a)(5): Bad for Trade, Bad for Security, and Fundamentally Unfair

In a fit of Vietnam-era antimilitarism, Congress passed IRS law 26 U.S.C. 923(a)(5), which unfairly discriminates against exporters of military goods. This law puts U.S. exporters at a significant disadvantage to their foreign competitors in the world market. By not allowing exporters of military equipment to establish Foreign Sales Corporations (FSCs), this law saddles some U.S. corporations with a Vietnam-era albatross that should be removed by Congress as soon as possible.

Proposition 65: This Broccoli May be Hazardous to Your Health

California's Proposition 65 is an example of how regulations become an enormous burden to business, and should be a warning to policy makers at the federal level. By requiring warning labels on foods containing any detectable level of synthetic chemicals thought to be harmful, but omitting naturally-occurring carcinogens, Prop 65 ignores good science, confuses consumers, and creates a lucrative lawsuit market for aggressive "bounty hunting" lawyers while doing little for public health.

The "Tulloch Rule": Micromanaging Private Property

An extreme interpretation of the Clean Water Act, the Tulluch Rule prohibited even minuscule soil movement on any property defined as a "wetland." As such, it gave the Army Corps of Engineers unprecedented control over local land use, something Congress never intended. After years of heavy-handed application, just months ago a federal appeals court struck down the Tulluch Rule. This experience should chasten Congress to clarify its intent on the Clean Water Act, and to write clear legislation in the future that precludes such extreme bureaucratic interpretation and application.

Out of Control: Ten Case Studies in Regulatory Abuse

Table of Contents

Direct all inquiries to:

Institute for Policy Innovation
250 South Stemmons,
Suite 215
Lewisville, TX 75067

(972) 219-0811 [voice]
(972) 874-5144 [fax]

Email: **ipi@ipi.org**
Website: **www.ipi.org**

Lexington Institute
1925 North Lynn Street
Suite 802
Arlington, VA 22209

(703) 522-5828 [voice]
(703) 522-5837 [fax]

Email:**soifer@lexingtoninstitute.org**
Website: **www.lexingtoninstitute.org**

Out of Control: Ten Case Studies in Regulatory Abuse Introduction

by Merrick Carey

We are pleased to present a lineup of outstanding essays written by some of our nation's most respected scholars on regulatory overreach and the challenge it poses to our citizens and economy. We are especially pleased to have an Environmental Protection Agency (EPA) scientist writing about a regulatory problem in his own agency and a member of the Civil Rights Commission commenting on the out-of-control Americans with Disabilities Act—which now "protects" a third of the nation's population, it seems.

"As the economy slows down and a Presidential election looms, we anticipate regulatory reform will receive growing attention from the nation's leaders."

In today's politically-charged environment, few areas of public policy enjoy broad, cross-ideological support. However, over-regulation has become so rampant that the fact that the federal government needs regulatory reform has become conventional wisdom. As the economy slows down and a Presidential election looms, we anticipate regulatory reform will receive growing attention from the nation's leaders.

In fact, today, there is bipartisan support for a regulatory reform bill that would require federal agencies to weigh the pros and cons and use good science when considering major new regulations. This Regulatory Improvement Act of 1998, introduced by Senators Carl Levin and Fred Thompson, directs agencies to perform cost-benefit and risk-assessment analyses and to inform the public about the purpose of burdensome new regulations before they are imposed. The bill enjoys support from a growing coalition in Congress, the Executive branch and (not surprisingly), from the public.

It is our belief that the only way federal regulatory agencies are going to be restrained is through rigorous, legally-mandated cost-benefit analysis.

While it is difficult to pinpoint the genesis of bipartisan support for the regulatory-reform efforts that grew out of the 1994 "Contract With America," one event may shed some light on what brought about this beneficial change. Perhaps it goes back to a February 8, 1995 hearing of the Senate Committee on Governmental Affairs, where former South Dakota Senator George McGovern, a liberal Democrat, testified in favor of regulatory reform. Senator McGovern's stunning testimony came only after he left the Senate and ventured into a small business of his own. "After I left the Senate in 1981—not an entirely voluntary departure on my part—I acquired a small hotel in Connecticut which I owned for two and a half years," said the reforming Senator. He continued, "One of the lessons I did learn in this brief experience is that public regulations in some cases are needlessly complicated and needlessly burdensome for business, and especially for small businesses." McGovern blamed over-regulation for contributing to the financial failure of his hotel.

"Public regulations in some cases are needlessly complicated and needlessly burdensome for business, and especially for small businesses."
– George McGovern

In his testimony, Senator McGovern recalled the time he was in South Dakota with the late Senator Hubert Humphrey, who was a part owner of the Humphrey Drugstore in Huron, South Dakota. The two Senators dropped in at the drugstore while an Occupational Safety and Health Administration (OSHA) official was doing an inspection. As a co-author of the act responsible for OSHA's jurisdiction, Senator Humphrey thought it might be interesting to join the inspector during his work. The inspector, while empowered by the legislative branch, certainly showed no signs of being intimidated, despite his senatorial chaperons.

As Senator McGovern tells it, "They started with a part of the drugstore that almost was never used. It was a storage area in the basement. And as we went down the basement steps, you had to bend your head just slightly to clear the

“One way to restrain the agency power grabs…is through legislation…requiring all major new agency initiatives to pass a sort of commonsense test.”

landing above the stairway there. And the OSHA inspector said, ‘Senator, you have got to do something about that. People could hit their heads there.’ And Hubert said, ‘Well, it might happen once, but they would not do it again.’” The Senators on the committee laughed and nodded knowingly, acknowledging the absurdity of the OSHA inspector’s statement. Senator McGovern continued: “He asked, ‘Do you mean I have got to tear out this whole floor and lower the basement, or raise the ceiling?’ And the inspector said, ‘Well you have got to do something with this.’” That was only the start of the inspection.

The Senator acknowledged, “I voted for most of the programs that were in operation, and I probably would vote for them again, but I am convinced that many of them could and should be simplified or eliminated.” McGovern the businessman, who as Senator played a significant role in developing today’s baroque federal regulatory regime, was quick to criticize, and even quicker to pass on that criticism to others. He explained that “a great many of these problems do stem from agency-level interpretations of what we are trying to do with regulations.”

When granting regulatory authority to agencies, Congress must learn from both the history of “agency-level interpretation” and from the self-aggrandizing propensities of federal bureaucrats, which leads them to embrace and expand any grant of power even tenuously conveyed to them. Agencies illustrate this pattern daily, be it the EPA’s mandate to protect the environment, which has led that agency to impose costs that are grossly disproportionate to supposed environmental risks, or OSHA’s new architectural designs for the Humphrey Drugstore.

“Congress should also step up its use of the Congressional Review Act, which gives it the power to zero out dangerous, burdensome regulations being foisted on private enterprise.”

One way to restrain the agency power grabs, without hindering the implementation of sound public-policy objectives, is through legislation that would have the effect of requiring all major new agency initiatives to pass a sort of commonsense test. The bipartisan Levin-Thompson Regulatory Improvement Act of 1998 would do just that, by permitting agencies to deal with matters assigned to them by Congress only after meeting a series of reasonable cost-benefit requirements.

Congress should also step up its use of the Congressional Review Act, which gives it the power to zero out dangerous, burdensome regulations being foisted on private enterprise.

Armed with bipartisan political backing and broad public support, Congress can implement the lessons learned from Senator McGovern’s testimony by embracing a concept of bureaucratic power that better balances regulation with freedom, and central control with common sense. Civil servants should have the authority to meet their congressionally-mandated goals, but this authority must be tempered by a sensible ends-means analysis and a recognition that the whole point of regulation is to protect citizens, not imprison them.

Merrick Carey is Chief Executive Officer of the Lexington Institute.

Labor Department Rule Threatens Integrity of Pensions

By Paul F. Steidler

Anyone who has ever tried to save money for retirement knows how challenging the task can be. The first obstacle faced is simply having the discipline to save for the future instead of consuming in the present. Choosing the most appropriate place to invest funds can also be a confusing experience, especially given the recent volatility in securities markets. Taxation can also be large and take a significant portion of one's investment return.

But amid these challenges, America's retirement and investment system has generated good returns and met the needs of working Americans and their families. It is the envy of the world, but it is also threatened, albeit in subtle ways, by a misguided Labor Department regulation that makes it more likely that pension funds will be diverted to social causes at the expense of retirees.

"Social investing" has been a trendy and heretofore largely voluntary activity of a relatively small group of investors. The social good that is sought may include the construction of low-income housing, infrastructure development, or the expanded employment of union workers. Social investors seem disinclined to believe that these benefits will naturally accrue from a strong private-sector economy.

The intended "social investing" benefits, however, typically come at a significant cost to investors. Dr. Alicia Munnell, a former member of President Clinton's Council of Economic Advisors, found that targeted social investments had assets that were significantly riskier and less liquid, and decreased returns by an average of two percentage points per year.

"Dr. Alicia Munnell, a former member of President Clinton's Council of Economic Advisors, found that targeted social investments had assets that were significantly riskier and less liquid, and decreased returns by an average of two percentage points per year."

America's pension system has proven to be among the world's most successful, in part because it is governed by the landmark Employee Retirement Income Security Act (ERISA), which has protected private-pension funds from mismanagement. ERISA is quite clear on how investment managers must have undivided loyalty to those whose money they hold in trust. A pension fund-manager is required to "discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries; and for the *exclusive* purpose of (1) providing benefits to participants and their beneficiaries; and (2) defraying reasonable expenses of administering the plan" (emphasis added).

A June 1994 regulation from the U.S. Department of Labor, "Interpretive Bulletin 94-1," however, would erode this essential underpinning of ERISA—and at the same time promote social investing (a.k.a. "economically targeted investments" or ETIs). Indeed, the meandering and convoluted bulletin seeks to "clarify" the above language of ERISA, something that an overwhelming number of pension managers and investors did not feel was necessary, let alone ask for.

"Pension-fund money is a lucrative target for those who wish to propagate big government."

The effect of the regulation is that, all other factors being equal, a pension manager may decide to make a social investment, or ETI. But in the real world, all other factors are never equal when it comes to making an investment decision and money managers are seldom Hamlet-like figures.

The regulation, in Labor Department bureaucratese, states in part:

> "It follows that, because every investment necessarily causes a plan to forgo other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return. The fiduciary standards applicable to ETIs are no different than the standards applicable to plan investments generally. Therefore, if the above requirements are met, the

> selection of an ETI, or the engaging in an investment course of action intended to result in the selection of ETIs, will not violate (ERISA)."

Left unchecked, "Interpretive Bulletin 94-1" provides legal and political cover for ideological and/or opportunistic fund managers to make investments based on politics instead of what is in workers' self interest. But of even greater concern, it provides a precedent—and a pretext—for the federal government to direct pension funds for political purposes.

At a time when the era of big government is proclaimed to be over and the American people regard tax hikes as anathema, pension-fund money is a lucrative target for those who wish to propagate big government. President Clinton, in fact, has long been tantalized by social investing. As governor of Arkansas, he imposed a minimum 5 percent quota on the amount of state pension funds that had to be targeted for ETIs. The President's 1992 campaign document, "Putting People First: A National Economic Strategy," also called for drawing upon public and private pension-fund money for an $80 billion infrastructure program.

"As governor of Arkansas, [Clinton] imposed a minimum 5 percent quota on the amount of state pension funds that had to be targeted for ETIs."

Congressman Jim Saxton of New Jersey, chairman of the Joint Economic Committee, has noted that the ramifications of the President's proposals at the national level would be sizable. A mere five percent national ETI quota would give the Administration more than $175 billion for its social agenda. But there is an even greater concern.

"The economic effects of even a five percent ETI quota would be disastrous for retirees," says Congressman Saxton. "Using the most conservative loss of 1.18 percent for ETIs, the 20-year aggregate loss would be $328 billion; a loss of 2.1 percent would result in a 20-year aggregate loss of $541 billion. What does that mean to the average pension beneficiary? At the minimum, the average retiree would lose $21,541 in his or her pension fund, and that figure could reach as high as $35,564."

Pension and retirement funds are all the more important to retirees because of projected shortfalls in the Social Security trust fund, something that is expected to affect baby boomers and those who are younger. The government's poor track record in managing the Social Security contributions of baby boomers obviously raises red flags concerning the possibility that Washington might also take a bigger role in influencing pension-fund investment priorities.

To date, the Administration's desire to intrude into the pension system and effectively abrogate ERISA has been held to a minimum. The potential ramifications of Interpretive Bulletin 94-1, and other measures that may follow it, are disturbing in terms of what it may cost retirees and how the federal government may deploy large amounts of capital inefficiently. Congress should require the Administration to rescind the unnecessary and potentially quite harmful bulletin, and closely track any activity that will seek to perpetuate the use of pension money in social investments.

Paul F. Steidler is a Senior Fellow with the Lexington Institute.

“Attempted” Environmental Crimes

by Kenneth Smith

Bobby Unser was lucky to be alive. The famed Indy race car driver and a friend had gone snowmobiling in a national forest in Southern Colorado in December 1996 when suddenly they found themselves in the midst of a blinding snowstorm. Beset by the loss of one snowmobile to an accident and by the mechanical failure of the other, they spent two nights and three days wandering through waist-deep snow and drifts of despair when they stumbled onto a barn with a phone and called for help.

Notwithstanding their frostbite and exhaustion, the two men survived. But Mr. Unser’s trials were not over. Unbeknownst to him, the Forest Service officials he contacted about helping him retrieve his snowmobile quietly made him the target of a criminal investigation. His offense? In the midst of his desperate search for help, he may have crossed into a federally protected wilderness area where motorized vehicles are not allowed.

“The standard of intent, known as mens rea, *did not apply in the case of this environmental crime…because his offense indirectly threatened the public welfare.”*

One says “may” because his snowmobile has never been found. (His friend’s vehicle was found outside the area.) Nor was there any other evidence showing he had broken the law, a crime punishable by up to six months in prison. Even if there had been such proof, there is no evidence to suggest that Unser knowingly and intentionally did so, the usual standard in criminal cases.

A federal district court in Colorado convicted Unser anyway, based on statements from federal officials who somehow surmised he had illegally entered the wilderness area. The standard of intent, known as *mens rea*, did not apply in the case of this environmental crime, Judge Lewis Babcock ruled, because his offense indirectly threatened the public welfare.

Mr. Unser’s presumed violation, he said, “has a direct relationship with the welfare of people in terms of the protection of and primitive enjoyment of wilderness areas… [and] it is not unduly burdensome for individuals using a regulated national forest system to inquire or have some duty to know of the boundaries of the wilderness area.”

“That Mr. Unser was lost and in danger of losing his life was irrelevant. Even in a blizzard, presumably, he should have known the boundaries of the wilderness area.”

Mr. Unser, who faced a jail term of up to six months, was fined $75. The case is now before the U.S. Court of Appeals for the 10th Circuit Court of Appeals, where a ruling is expected shortly.

The criminalization of Mr. Unser’s confusion is part of an increasing trend to treat violations of environmental statutes as crimes regardless of the offender’s intent. In a 1993 ruling, the 9th U.S. Circuit Court of Appeals held that violations of the Clean Water Act and other environmental laws threaten the public welfare and do not, therefore, require any showing of intent in order to convict the accused. The idea is that the prohibited activity is so obviously dangerous that someone should know what he is doing is illegal. That Mr. Unser was lost and in danger of losing his life was irrelevant. Even in a blizzard, presumably, he should have known the boundaries of the wilderness area.

Bizarre as that may sound, the Clinton administration and some Congressional lawmakers would lower the bar for criminal conviction still further. During his 1996 presidential campaign, President Clinton proposed a $1.9 billion initiative to fight environmental crimes. This included a proposal to outlaw “attempted” environmental violations.

Attorney General Janet Reno subsequently sent to Congress the “Environmental Crimes and Enforcement Act of 1996”. Among other things, she said, “the legislation adds an ‘attempt’ provision to environmental crimes so that we may prosecute environmental criminals even when we stop a crime in progress.”

In theory, at least, criminalizing attempted environmental violations sounds like a good idea. Under current law, federal law-enforcement officials can't prosecute a violation in progress before it has done any harm to the environment. So if they come across a possible violation, they have to decide whether to bring it to a halt and walk away from a criminal prosecution, which is not a politically attractive option for an administration that promises to get tough on polluters. Or they have to wait for the environmental damage to be done and then prosecute. By subjecting attempted crimes to the same penalties as completed crimes, law-enforcement officials can avoid having to make the choice.

"The effect would be to shift the traditional government burden to demonstrate a defendant's criminal intent to the defendants themselves, who would have to show they did not have such intent."

But what would it mean to combine an attempted-crimes provision, which ordinarily includes a *mens rea* requirement, with environmental statutes that don't? How can law-enforcement officials prosecute someone for attempting to commit a crime when they don't even have to show he had an intent to do so?

The effect would be to shift the traditional government burden to demonstrate a defendant's criminal intent to the defendants themselves, who would have to show they did not have such intent.

Say a man buys some clean fill dirt to put on his property, some of which, he knows, includes federally protected wetlands. He puts the fill on non-wetlands portions of the property but is arrested by law-enforcement officials on grounds that he was going to fill the wetlands. Notwithstanding the fact that he didn't fill them, the burden is on him to prove that he wasn't going to fill them.

Or consider a similarly hypothetical incident involving Mr. Unser. Say he is riding around on his snowmobile on a clear day (as it was when he began his real trip) in a non-wilderness area. Law-enforcement officials arrest him anyway on grounds that he was attempting to violate the laws protecting such areas. It would be up to Mr. Unser to prove he had no such intent.

Such hypotheticals might appear to be just that: hypothetical. But who would have thought federal officials would prosecute a man lost in a snowstorm in life-threatening circumstances, even though they couldn't show he actually broke the law? Who would have thought a federal judge would uphold their prosecution and convict him? The answer is the same people now trying to unleash prosecutors on hapless citizens who never realized they were attempting to commit a crime.

Kenneth Smith is an editorial writer for the Washington Times.

The Americans with Disabilities Act: Hurting the Disabled

By Russell Redenbaugh

When Ryder Systems fired a truck driver on safety grounds after he suffered an epileptic seizure, subsequent events seemed to bear out the company's decision. After another firm hired the driver, he had a seizure while driving and crashed into a tree.

But the Equal Employment Opportunity Commission didn't see it that way. Saying Ryder had unfairly removed the driver from his job, the agency filed suit against the company under Title One of the Americans with Disabilities Act (ADA). In January 1997, it won a $5.5 million jury verdict against Ryder, an award the trial judge later reduced to $491,000. Both sides have since appealed the decision to the 6th U.S. Circuit Court of Appeals.

The EEOC isn't always so fortunate. The courts have thrown out less outrageous claims than that epileptic drivers should remain behind the wheel. But notwithstanding the good intentions of the lawmakers who passed (and of President Bush who signed) the Americans with Disabilities Act, the courts find themselves dealing with many disability cases that appear outrageous to most Americans and which damage the reputation of both the ADA and those with severe disabilities. The fact that these kinds of cases are growing in number is especially disturbing at a time when 70 percent of the severely disabled are not employed and about 7.5 million Americans remain on the Social Security disability rolls.

"The courts find themselves dealing with many disability cases that appear outrageous to most Americans and which damage the reputation of both the ADA and those with severe disabilities."

Disabilities do exist. They do limit the abilities of people, perhaps not as much as some think, but the effect is not trivial and it is certainly real. Prejudice and ignorance are also undeniably real. Often employers assume that a single, limited disability means that a worker is wholly disabled. That isn't true. The Americans with Disabilities Act helps ensure that its beneficiaries have an equal opportunity to succeed. The tragedy is that public attention, which should be focused on ways to encourage the employment of persons with disabilities, has been diverted by the continued abuse of the law passed in their name. And as more and more of these cases come to light, a growing number of Americans have begun to think of the ADA (to borrow the title of a recent news report) as "The Americans with Minor Disabilities Act." Consider:

Characterizing EEOC's position as "troublesome," a federal judge in Detroit ruled last January that the agency should not have sued Hertz Corporation for disabilities discrimination when Hertz dismissed, for reasons of misconduct, a "job coaching service" engaged to help mentally retarded workers. Three months after the employees started working for Hertz at the Detroit airport in early 1994, the two job coaches were observed by several Hertz supervisors "engaged in rather passionate lovemaking" in the front seat of a car, while their two charges were in the back seat. The EEOC filed suit for the job firm (which received government funds for its coaching service), alleging that the provision of a job coach was a reasonable accommodation under ADA, and that once the company hired the employees, it was obligated to continue that accommodation indefinitely. The court compared the lawsuit to the fairy tale about the emperor's new clothes, and characterized EEOC's position as an unwarranted expansion of the ADA that would have the effect of punishing employers for hiring persons with disabilities. [EEOC v. Hertz, 7 A.D. Cases 1097, 11 NDLR P 293, 1998 WL 5694 (E.D. Mich.).]

In the case of Mathews v. Trilogy Communications, the Eighth U.S. Circuit Court of Appeals ruled that the termination of an insulin-dependent diabetic traveling sales representative, after he became uninsurable because of his bad driving record, did not establish disability-based discrimination, since at the time of termination he no longer met the same professional requirements—i.e. having a valid driver's license and being insurable under the employer's insurance policy—as when he was hired. The court's reasoning was that these were not just mere company rules, but rather objective qualifications for the job because sales personnel must be able to drive to clients' locations. The decision also referenced the man's failure to tell management about his prior arrest for driving under the influence of alcohol. [Mathews v. Trilogy Communications Inc., 143 F. 3d 1160 (8th Cir. 1998).]

Absurd court cases aren't the only problem with the way the EEOC has chosen to implement and enforce disabilities law. It is difficult to appreciate the length and breadth of some of the law's current requirements until one has read the agency's enforcement guidance on "Pre-Employment Inquiries and Medical Examinations." For example:

"A growing number of Americans have begun to think of the ADA (to borrow the title of a recent news report) as 'The Americans with Minor Disabilities Act.'"

- Unless they are asking specifically about the ability to perform a job function, employers may not ask whether applicants can perform "major life activities" such as standing, lifting, or walking because such questions "are likely to elicit information about a disability."
- Employers may not ask questions about lawful drug use since these, too, go to the severity of an impairment. An employer may ask questions about prior illegal drug use, so long as the employer does not ask about addiction to drugs, since this is a covered disability under the ADA. Employers may find that distinction an awfully fine one.

The danger here is that the fear of a litigious, activist EEOC may discourage hiring of the very disabled persons the law was meant to help. An employer faced with the prospect of hiring a disabled but nonetheless qualified applicant or hiring a less-qualified but non-disabled applicant must take into consideration this potentially ruinous EEOC "tax."

There is more than a little evidence that they already do. It is a worrisome fact that about 87 percent of complaints to the EEOC come from individuals who are already in a job. Research also shows that the overwhelming number of ADA Title I-related court cases involve firing, rather than hiring, decisions. Considering that the hiring of the disabled was an important point of the ADA, and that only about 30 percent of the severely disabled are in the work force, this is rather shocking. It seems to be what Sherlock Holmes might call "the dog that didn't bark."

The law simply hasn't worked for the seriously disabled. It has justified the concerns of those who warned the law would generate abuses. And now the core ideal of the law is being pushed to extremes that are not defensible to the American public, thus undermining and jeopardizing the acceptance and long-term goals of the ADA.

Congress must reform the act. The disabled face obstacles enough without having the EEOC add more.

Russell Redenbaugh is a Commissioner of the U. S. Commission on Civil Rights. He is also an economist for a Philadelphia-based investment firm.

Bilingual Education: Federal Regulations Against Learning English

By Don Soifer

The U. S. Supreme Court, in its 1974 Lau v. Nichols decision, unanimously ruled that under Title VI of the Civil Rights Act of 1964 school systems were required to "take affirmative steps" to provide special assistance for Limited-English Proficient (LEP) students. The Court did not specify what form that special assistance should take, but allowed state and local decisionmakers to employ any approach that would effectively include English learners. In cases where it could be shown that districts failed to provide adequately for their LEP populations, federal authorities were granted regulatory authority to intervene and prescribe appropriate remedies.

The U.S. Department of Education's Office of Civil Rights (OCR) has negotiated hundreds of "compliance agreements" with school districts around the country. Districts are compelled to implement these agreements, as the penalty for noncompliance can be the loss of all federal funding for education programs. Currently there are nearly 300 cases being monitored by OCR, and there have been hundreds more since the 1974 Lau ruling.

"Compliance agreements often implicitly favor bilingual education."

Many of these so-called "Lau remedies" take the form of massive legal documents mandating costly and complex "solutions." Such agreements can become so difficult for school districts to comply with that whatever redeeming value was implied in their original purpose is completely eclipsed.

In adhering to the Court's ruling in Lau, OCR guidelines explicitly direct that no particular type of language instruction program be favored over any other. But compliance agreements often implicitly favor bilingual education. In fact, Assistant Secretary of Education for Civil Rights Norma Cantu herself has a lengthy professional background as a bilingual education advocate, having served as litigating counsel for the Mexican-American Legal Defense and Education Fund (MALDEF) for over ten years prior to assuming her post in the Department of Education. MALDEF has maintained a high profile as a leading advocate of bilingual education programs around the United States.

At hearings held earlier this year before the House Education and the Workforce Committee, former Office of Civil Rights attorney James M. Littlejohn testified that a review he conducted of a number of compliance agreements negotiated in 1995 revealed:

> Each of the plans required bilingual education, as well as English as a Second Language instruction. However, none of the plans contained time frames for moving students into English, or indicated any sense of urgency that students should become fluent English speakers within any particular period of time.[1]

"It is little wonder that only 7 percent of California's 1.3 million 'Limited English-Proficient' students were learning enough English to graduate back into mainstream classes each year."

Children in bilingual education programs very often learn English slower, later, and less effectively than other children. In June, California voters resoundingly rejected bilingual education and its thirty-year record of failure. It is hard to imagine a system that could make it harder for children, particularly Hispanic children, to learn English than the one they replaced. Would-be English learners were segregated in isolated classrooms, often for 5 to 7 years or even longer, where they were taught in their native language at least 75 percent of the time. Many of these "bilingual" classrooms did not even begin teaching students written English until the fourth grade. It is little wonder that only 7 percent of California's 1.3 million "Limited English-Proficient" students were learning enough English to graduate back into mainstream classes each year.

Often Lau compliance agreements favor bilingual programs indirectly. For instance, certain agreements:

- Require districts to consult the National Clearinghouse for Bilingual Education to obtain research on English-language instruction programs. The federally-funded Clearinghouse heavily favors bilingual education as its preferred method of instruction.[2]
- Require that program support staff, even those who are not allowed to provide direct instruction, be proficient in reading, writing and speaking the non-English native language of the students in the programs they support.[3]

In addition, there are other significantly counterproductive ways in which compliance agreements regulate how some school districts teach English learners. According to recent testimony before the House Education and the Workforce Committee, agreements currently in effect:

"Policymakers around the country have begun to seriously question the effectiveness of bilingual education, which is found in all fifty states."

- Dictate that districts classify students as LEP if they have a home language other than English—even when they speak only English or are English-dominant. This is particularly critical in districts using bilingual education, where students are segregated out of mainstream classrooms until such time as they are judged to have fulfilled standard program exiting requirements.
- Exclude the judgement of classroom teachers from program-exiting criteria and allow only standardized test scores to be used. Only when students test above minimum levels in speaking, reading, writing and comprehension, a formidable hurdle even for many many native English speakers, can they be allowed to graduate into mainstream classes. Such extreme standards often result in extending the length of time children remain segregated in bilingual programs.

Recently, the House of Representatives passed the English Language Fluency Act, which if adopted into law would eliminate all standing Lau compliance agreements. On the heels of the June victory in California, policymakers around the country have begun to seriously question the effectiveness of bilingual education, which is found in all fifty states.

As former Congressman and Cabinet member Jack Kemp recently suggested, "What better or more fitting way can we demonstrate to our Hispanic and other language minority communities that [we are] working to enable the success of their children than to take these innovative steps to ensure that they are taught English as soon as possible once they enter school?" The removal of the cumbersome and counterproductive burdens these agreements place on school districts would be a major step towards reaching that goal.

Don Soifer is Vice President of the Lexington Institute.

---

1 Statement of James M. Littlejohn before the House Education and the Workforce Committee, April 30, 1998.

2 OCR Proactive Initiative 05-97-5007, Indianapolis Public Schools.

3 OCR Proactive Initiative 15-98-5001, Cleveland Public Schools.

Sludge Magic: EPA Spreads E. Coli

by David L. Lewis, Ph.D.

According to scientists working for the Environmental Protection Agency's Office of Research & Development, the Sludge Rule on land application of municipal wastes (40 CFR Part 503) promulgated in 1993 may be the most scientifically unsound action ever taken by the agency. Rather than being protective, the rule actually threatens public health and the environment.

In short, EPA's sludge rule permits land application of dried urban sewage—called "sludge"—in lieu of dumping it in the ocean, which is now prohibited. About half of the sludge from municipal waste treatment facilities across the U.S., containing human sewage, agricultural runoff and industrial wastes, is now being used to fertilize farmland, national forests, and other areas. This amount is rapidly increasing as states and waste disposal companies pressure local communities to use sewage sludge and assure the public that the EPA has determined it to be virtually risk-free.

"Rather than being protective, the rule actually threatens public health and the environment."

In 1972 Congress amended the Clean Water Act directing EPA to develop regulations for disposing of sewage sludge. A U.S. District Court in Eugene, Oregon followed suit in 1990, issuing a consent decree requiring the agency to promulgate the regulations within two years.

Remarkably, the agency's position on this issue reveals a sort of environmental doublespeak—traces of pesticides, heavy metals, and industrial wastes that environmental officials have long argued cause cancer and other major public health problems—are now said to be completely safe for disposal on farmlands, forests, even home lawns and gardens.

The science behind EPA's sludge rule, according to some of the agency's own scientists who reviewed it, was so bad it was popularly deemed "sludge magic" [See EPA Magic, next page]. Because sludge contains human pathogens and trace quantities of mercury, lead, and other toxic metals, applying it to areas used for growing food crops and selling bags of it to home gardeners is a source of concern. Ecologists also have reservations about the effects of nutrients, toxic metals, and other pollutants leaching from sludge into surface and groundwater.

"Content that syringes and rubber gloves no longer litter our beaches, few policymakers and reporters seem even slightly curious about how our government solved the problem of ocean dumping of municipal wastes."

Indeed, government researchers in Canada collaborating with scientists at the University of Quebec last year published a study showing that forests treated with sewage sludge released toxic metals in amounts that exceeded water-quality criteria for protecting aquatic organisms.

Disease-causing microorganisms that can lie dormant or proliferate in soil treated with sludge are even more disconcerting to microbiologists. Samples taken this year from land in north Kansas City contained 650,000 salmonella and E. coli bacteria per 100 grams of soil - many thousands of times higher that what is considered safe by public health officials. The source, apparently, was sludge applied in the area before 1992.

The appearance of new strains of staphylococcus, tuberculosis, E. coli and other bacteria—some of which are completely resistant to modern antibiotics—has led to a resurgence of life-threatening infections that were once easily treated. Spreading sludge, which contains such superbugs flushed down hospital sewer lines, on farms and home gardens throughout the U.S. has scientists both inside and outside of EPA understandably concerned.

With increasing numbers of children dying from E. coli strain O157 traced to an assortment of products, including strawberries and hamburger meat, citizens are becoming increasingly concerned over agricultural products imported from less developed areas of the world where human waste serves as cheap fertilizer. Content that syringes and rubber gloves no longer litter our beaches, few policymakers and reporters seem even slightly curious about how our government solved the problem of ocean dumping of municipal wastes.

Still, it is what EPA's sludge rule says about many of the agency's other regulations that seems most enigmatic. When asked why pesticides, organic solvents, toxic metals and other pollutants in sludge pose virtually no risk to public health or the environment, agency officials point to a lack of documented cases of anyone becoming sick from exposure to sludge. Critics argue that the same can be said of traces of pesticides and other industrial chemicals in drinking water. EPA's position on sludge, they say, shows that agency regulations are often based on political expediency, not sound science.

"It is what EPA's sludge rule says about many of the agency's other regulations that seems most enigmatic."

EPA MAGIC

Concerns	EPA "Magic"	Scientific Facts
Toxic metals, such as lead, cadmium, and mercury in sludge present a threat to public health from direct exposure and from uptake by food crops.	Metal contaminants are permanently bound to organic matter in sludge and cannot be taken up by plants or released to expose humans and animals. Only material with very low levels of toxic metals are permitted for land application.	Changes in pH, activity of soil microorganisms, and other soil processes can cause metals to be released. With no monitoring required and no limits set on maximum concentrations that can accumulate, metals will reach toxic levels after repeated applications of sludge.
Human pathogens in sludge can infect workers handling the material, people living in or around areas where sludge is applied, and consumers who eat crops grown on contaminated land.	Sludge is treated to reduce numbers of pathogens to safe levels. Any remaining pathogens die within 30-60 days after land application. No case of disease from exposure to treated sludge has ever been documented. Similar use of cow manure has not created public health problems from pathogens.	Approximately one third of the population including infants, the elderly, people with chronic diseases, patients on chemotherapy, and people with AIDS are susceptible to low levels of pathogens. Bacteria, such as *E. coli*, can remain dormant in soil for years.
Land application of human waste will spread antibiotic-resistant microbes throughout our environment and bring them in direct contact with the food supply.	Manure from farm animals treated with antibiotics is already widely applied to farmlands.	Specific sources of sporadic infections are rarely traced. Few diseases are transmitted from cows to man. All pathogens in human waste can potentially infect other humans. Human wastes, especially originating from hospitals, contain microbes resistant to antibiotics that are our last line of defense against tuberculosis and other major diseases.

Dr. Lewis has a Ph.D. degree in microbial ecology, works as a research microbiologist for the U.S. EPA Ecosystems Research Division, and is an adjunct scientist at the University of Georgia.

DISCLAIMER: These comments represent Dr. Lewis' personal views, not official policies of the U.S. EPA.

The Sugar Program's Bitter Harvest

by Deroy Murdock

When the Feds walked into American pantries to protect sugar producers during the Great Depression, they could have minimized the damage of this needless intervention by writing subsidy checks to the sugar industry. Instead, Washington cooked up a dizzying blend of price floors, import tariffs and refinery loans that has aided the industry while leaving its critics lost in the minutiae. Thanks to the Jones-Costigan Sugar Act of 1934, this convoluted scheme has harmed consumers, exported poverty, stymied free trade, wounded wildlife and corrupted American politics for 64 years.

"Thanks to the Jones-Costigan Sugar Act of 1934, this convoluted scheme has harmed consumers, exported poverty, stymied free trade, wounded wildlife and corrupted American politics for 64 years."

The sugar program begins with a government-set price floor. While the world market price currently is about 8.85 cents per pound, the federally-established domestic sugar price stands at 18 cents per pound for raw cane sugar and 22.9 cents per pound for refined beet sugar. Consequently, Americans spend more for candy bars, processed foods and numerous other items.

The General Accounting Office estimates that consumers pay an extra $1.4 billion per year thanks to this law. "Because sugar is an ingredient in many food items," a 1988 Commerce Department report explains, "the effect of the sugar program is similar to a regressive sales tax, which hits lower-income families harder than upper-income families." A group called Public Voice for Food and Health Policy calculates that politically-set prices for table sugar alone cost consumers an extra $200 million per year.

The program also lends money to sugar-beet and sugar-cane processors who pledge sugar as collateral. Uncle Sam then keeps prices high enough so that refiners do not default on their loans, while the government seldom collects the sugar. In fiscal year 1997, the U.S. Department of Agriculture (USDA) made loans worth $267.4 million to sugar-beet processors and $120.6 to sugar-cane refiners.

In addition, this policy restricts foreign sugar through country-specific quotas, imposing a cap on total imports of 1.6 million metric tons, or about 19.5 percent of annual U.S. consumption. These barriers yield several negative consequences:

- The entire U.S. economy suffers as capital and human resources are diverted into the "import substitution"-style domestic production of a commodity that would be more efficient to purchase abroad.
- Overseas trade ministers point to America's Great Wall of Sugar when U.S. officials try to open global markets. Why, foreign leaders must wonder, should they lower their trade barriers when Washington hypocritically protects its own sugar industry? These obstacles indirectly help keep markets shut that otherwise could be open to myriad American exports.
- Caribbean nations, among others, that are naturally equipped to grow sugar likely would be more prosperous were their citizens free to export as much sugar as Americans wanted to buy. As wealthier societies, they also could afford more and better American-made products. One wonders if Haitians, for instance, might not be more wealthy and stable if they were not handcuffed by a 7,258-metric ton U.S. sugar-import quota.

"The General Accounting Office estimates that consumers pay an extra $1.4 billion per year thanks to this law."

The sugar program kills jobs at home, too. Since 1981, 12 of America's 22 sugar refineries have failed due to severe restrictions on imported sugar cane. The closure of two Philadelphia refineries cost 1,135 jobs. Bobs' Candies, America's largest candy-cane manufacturer, recently opened a plant in Jamaica where sugar costs half its U.S. price. "Our company would save $2 million a year in raw-materials costs if the sugar program were eliminated," Bobs' Candies' President, Greg McCormack, tells *Reader's Digest*. "That would help us keep jobs in America, and it would lower the retail price of our candy canes by 10 to 15 cents a package."

Compare this impoverishment with the bonanza the sugar program offers a few well-connected growers and processors. Just one percent of producers receive 42 percent of the policy's financial benefits. Sugar plantations also cannot claim to be the at-risk family farms enshrined in American legend. In 1995, the USDA compared the non-cash economic benefits that accrue to farmers of various commodities thanks to government action. Wheat growers saw $23-per-acre in state-sponsored added value. Cotton farmers enjoyed $87 per acre in benefits. Meanwhile, Washington enriched sugar growers fortunes by an average of $472-per-acre. "It's constituted so it's not a government outlay," explains Burt Eller of the Coalition for Sugar Reform. "It's constituted so that the consumer pays the bill."

"Even worse, subsidized sugar plantations—which would be uneconomical without these policies—have 'been a recipe for ecological mayhem'"

Even worse, subsidized sugar plantations—which would be uneconomical without these policies—have "been a recipe for ecological mayhem" as Public Voice puts it. They have choked Florida's Everglades with phosphorous run-off, causing serious harm to pink shrimp, spiny lobster, sea trout, snakes and migratory ducks. Cattails and hemp vine have displaced saw grass and other beneficial flora. As visitors spurn the Everglades due to its environmental decline, the National Audubon Society reports, some 60,000 tourist-sector jobs have evaporated. In April 1996, Congress voted to spend $300 million to begin repairing this sugar-coated eco-disaster. Total rehabilitation expenses could reach $700 million.

"The damage is real high, real serious and expensive," says Ron Tipton of the World Wildlife Fund. "It will take a long time and a lot of money to clean it up."

How on Earth does this economically and ecologically toxic program survive? As *Rolling Stone's* Dan Glick explains: "The secret to this success" is "enormous influence peddling, huge political action-committee contributions, unabashed electoral logrolling and a textbook case of how interest groups join together in ferocious packs to bully Congress."

When U.S. Senator Judd Gregg (R - New Hampshire) introduced legislation in February 1996 to end the sugar program, the top 10 recipients of sugar industry campaign donations mounted the barricades. According to the Center for Responsive Politics, these senators received an average of $37,677 in sugar PAC money between January 1989 and June 1995. They ranged ideologically from Tom Harkin (D - Iowa) on the left to Jesse Helms (R - North Carolina) on the right. Despite their differences elsewhere, the industry's 10 best friends stood as one against the Gregg amendment which failed 35 to 61.

The federal sugar program fails on financial, free-trade, fairness, clean-Earth and clean-government grounds. Like a wrecking ball manned by an over-caffeinated operator, it seriously damages whatever it touches. At the earliest opportunity, Congress should ignore the pleas of this program's well-heeled beneficiaries and liquidate it like a sugar cube in a steaming cup of coffee.

New York commentator Deroy Murdock is an MSNBC columnist and a senior fellow with the Atlas Economic Research Foundation.

The FCC's Universal Service Program: Press "D" for Dismantle

By Tom Giovanetti

Born of good intentions in the 1930's, the Federal Communications Commission's program to wire rural America with universally-available telephone service has become a fountain of taxation in the 1990's. Digital-age technology makes the "universal service" program obsolete, and Congress should repeal it.

When the Telecommunications Act of 1934 was written, Congress realized that phone service would be more than an amenity in American life. It would become part of the nation's economic infrastructure, and places deprived of it would one day find themselves outside the economic mainstream.

"Digital-age technology makes the 'universal service' program obsolete, and Congress should repeal it."

Congress wanted to promote equal access, but there was an obstacle: the sheer economics of stringing copper wire from switching stations to homes and offices gave an advantage to urban dwellers. Left to market forces, it would always make more sense to wire the next block in Manhattan than the next town in Wyoming.

So Congress treated phones the way it treated rural electricity, by tapping the industry's national revenues to create a pool of funds to subsidize service in rural areas. Thus the "universal service" program got its start as a way to extend lines to remote areas or islands.

In time the program took on a second task—subsidizing home service for low-income Americans, regardless of where they live. Today, the FCC runs two separate programs for low-income families. One pays up to $7.00 of monthly phone bills; another pays part of a family's cost of installing a new phone line. These activities are funded by a three percent federal telephone excise tax that nets about $4 billion in revenue each year.

Like much of 1930s vintage telecom regulation, "universal service" has run its course—not because it's an unworthy goal, but because markets and new technology are now accomplishing what the old government program set out to do. Congress can save consumers billions on their phone bills and relieve the FCC of a huge administrative burden by ending the program. How can the government afford to do this? The answer boils down to two words: "wireless" and "competition."

Wireless technologies—such as "wireless local loop" that sends signals between end-users and a neighborhood transmitter, or direct-to-satellite technologies—have transformed the economics of network "buildout." As Brian Dailey, the Chief Operating Officer of Lockheed Martin's emerging commercial telecom business, has said of wireless technology, "Throughout the developing world it's becoming the technology of first choice not just for businessmen, but for the companies that are connecting remote populations to the telecommunications network for the first time."

"Vice President Gore is at the forefront of this initiative, hence the 'Gore tax' nickname for the charges passed on to consumers."

The reason for the popularity of wireless is simple: it can cut the cost of bringing telephone service to a remote village by 75 percent or more. And options are increasing. A recent report from western Alaska described the installation of satellite-based telephone and Internet connections in an Eskimo village. For the cost of connecting three houses with conventional wiring, the entire town was connected with wireless technology to a high-quality, high-bandwidth signal.

As advancing technology and increased competition continue to drive costs down, the economics will only become more favorable for consumers, and the need for a federal universal-service program will move from being anachronistic to absurd.

There is an additional reason to end the program: It has become a platform for new federal tax schemes.

The first was written into the Telecommunications Act of 1996 and implemented with great gusto by the Clinton Administration: the "e-rate," an expansion of the universal service program to wire schools and libraries nationwide to the Internet. Rather than use available universal service funds, the FCC imposed additional charges on phone carriers, which are passed on to consumers. Vice President Gore is at the forefront of this initiative, hence the "Gore tax" nickname for the charges passed on to consumers ($0.93 per month for AT&T customers, 5 percent surcharge for MCI's, 4.5 percent for Sprint's).

This program was attractive to Members of Congress who enacted it—it seemed a cost-free bonus for every school in America. But there are second thoughts, prompted by the costs, the FCC's resistance to explicit billing that shows consumers how the e-rate is driving their bills up, and the expensive new bureaucracy created to run it. The basic premise of the e-rate is dubious.

"The Internet Tax Freedom Act, recently passed by the House of Representatives, shields much of the Internet but leaves a gaping opening for the FCC to impose charges on Internet telephony."

If education is controlled locally, why is Washington starting a new education program, with a special tax and a new pool of federal revenue to redistribute? And why is Washington setting the spending priority? If there's no clear evidence that computers and on-line experiences will spur learning more than improved books and facilities, higher teacher pay, or any of dozens of other options that local school boards might favor, why is Washington pushing the Internet? Isn't that better left to local choice?

The second new tax scheme is a threat to consumers and to the Internet itself. Using universal service authority, the FCC announced last April that it might possibly tax Internet telephony by imposing the access charges paid by companies that handle traditional phone traffic. Internet (or IP, for "Internet protocol") telephony is a recent innovation that transforms voice to digits, just as a computer translates photographs to digital images, and sends it across the Internet or similar networks. Depending on the customer and the service offered, an Internet phone call may be the equivalent of a local call, or it may be a sharply discounted long-distance call.

What is clear is that this new form of telephone service is saving billions of dollars for consumers both through direct savings, and by spurring hidebound telephone monopolies around the world to begin adapting to new technology and new forms of competition. New charges would stifle this service, which now has only a one percent market share.

Perhaps more important, the FCC would be adding taxes and regulations to the Internet, a previously tax-free environment that is generating jobs, innovation, and new forms of commerce for our economy. The Internet Tax Freedom Act, recently passed by the House of Representatives, shields much of the Internet but leaves a gaping opening for the FCC to impose charges on Internet telephony.

Congress should have the foresight to take one of the rarest and most difficult steps in government: it should declare the universal service program a success, and dismantle it.

Tom Giovanetti is President of the Institute for Policy Innovation.

26 U.S.C. 923 (a)(5): Bad for Trade, Bad for Security, and Fundamentally Unfair

Loren B. Thompson, Ph.D.

Although the federal government's capacity for capricious behavior sometimes seems boundless, it is pretty rare to come across a law or regulation that simultaneously manages to harm national security, undercut trade competitiveness, and raise fundamental questions of fairness. The Internal Revenue Service administers such a law though, and it has been on the books for nearly a quarter century. The law is 26 U.S.C. 923 (a) (5), and what it does is discriminate against military exports in the application of the federal tax code.

" 26 U.S.C. 923 (a) (5) discriminate[s] against military exports in the application of the federal tax code."

Under the IRS code, exporters are permitted to establish Foreign Sales Corporations (FSCs or "fisks") that receive favorable treatment when corporate income taxes are assessed. In essence, a portion of the income derived from overseas sales of goods and services is exempted from taxation. The purpose of this provision when it was originally conceived was to level the playing field between U.S. and European companies by compensating for tax advantages some European states grant to their exporters. Specifically, the Europeans—who generally do not have corporate income taxes like those in the U.S.—excluded export goods from the application of their value-added tax (VAT), a sort of glorified sales tax.

By excluding export goods from the VAT, the European governments in effect reduced the cost of those goods to foreign purchasers. Other things being equal, that would enable them to undercut the price of similar U.S. goods. The U.S. government sought to nullify the impact of this market-distorting practice by codifying the right of U.S. exporters to set up Foreign Sales Corporations that would be partially exempt from federal corporate-income taxes. According to the Aerospace Industries Association, U.S. companies can eliminate 15-30% of the federal tax burden on their export profits when they take advantage of the FSC provisions.

"Companies that …export…commercial products of dubious social value—violent video games, smokeless tobacco, 'fortified' wines—can enjoy the full benefits of the federal tax subsidy, while companies providing U.S. allies with the means to defend themselves cannot."

But in 1976, Congress decided that producers of military goods did not deserve to get the full tax benefits available to other companies. The result was Section 923 (a)(5), which directed that arms exporters should only receive 50% of the tax break available to exporters of other kinds of goods. What this means is that companies that are engaged in the export of all sorts of commercial products of dubious social value—violent video games, smokeless tobacco, "fortified" wines—can enjoy the full benefits of the federal tax subsidy, while companies providing U.S. allies with the means to defend themselves cannot.

The ostensible logic for imposing this discriminatory tax treatment was that U.S. companies so dominated the global arms trade that they were not really operating in a competitive marketplace. If they weren't really competing, the reasoning went, then they didn't need favorable tax treatment to level the playing field. Congress conveniently ignored the fact that the same logic could have been applied to mainframe computers, commercial airliners, and any number of other products in which America dominated the global marketplace. It overlooked these product categories because the real reason for discriminating against arms exports was to punish weapons makers.

The year that Section 923 (a)(5) was enacted was a bad year for all things military in America. North Vietnam had overrun the South the year before, bringing a tragic end to the U.S. military involvement in Indochina. Public perceptions of the armed forces were at a low ebb, as was the defense budget. Section 923 (a)(5) was simply one of many manifestations of Congressional antimilitarism during that period.

It all seems like a long time ago, but the discriminatory tax regime embodied in Section 923(a)(5) remains in force today. That's unfortunate, because it clearly undercuts the competitiveness of many of the nation's biggest exporters, thus eroding the trade balance and impeding America's ability to arm its allies. The higher tax burden imposed on military goods not only puts their price beyond the reach of some allies, but also makes it harder for U.S. companies to compete with the offerings of arms merchants in other countries such as Russia and China.

"The real reason for discriminating against arms exports was to punish weapons makers. Section 923 (a)(5) was simply one of many manifestations of Congressional antimilitarism during that period."

It's not so clear the U.S. Treasury derives any real revenue benefit from the provision. The Congressional Joint Tax Committee estimates that repeal of the section would cost about $70 million annually in lost corporate-income tax revenues over the next five years, but net loss in taxes might be nil if lower prices made possible by a lower tax burden enabled U.S. companies to gain a greater share of the global arms market. In such circumstances, the lower rate of taxation on military exports would be compensated for by the greater volume of exports being taxed.

Senator Connie Mack (R-FL) introduced a bill in the most recent session to repeal Section 923(a)(5). It did not pass, but a similar provision will undoubtedly be proposed in the next session and deserves a serious hearing. The destructive consequences of Section 923(a)(5) will only grow now that Congress has added commercial satellites to the State Department's Munitions List, making them subject to the same discriminatory tax treatment as military goods. It is time to rethink this anachronistic legacy of an era when Congress cared more about punishing the defense industry than it did about national security or trade competitiveness.

Dr. Thompson is Chief Operating Officer of the Lexington Institute and teaches in the Georgetown University National Security Studies Program.

Proposition 65 Warning: This Broccoli May Be Hazardous to Your Health

By Jeff Stier

The Wild West is back and its bounty hunters are headed to a small business near you.[1] In 1986, California's environmentalists used the state's initiative process to enact the Safe Drinking Water and Toxic Enforcement Act of 1986, or Proposition 65.[2] The bill's title is so appealing that almost two-thirds of the voters approved it, allowing its actual provisions to evade scrutiny by any legislative body. As measures modeled after Proposition 65 are introduced around the country, those of us who support reasonable public health laws should take a closer look at the havoc Proposition 65 is wreaking.

"As measures modeled after Proposition 65 are introduced around the country, those of us who support reasonable public health laws should take a closer look at the havoc Proposition 65 is wreaking."

In part, Proposition 65 mandates that the governor compile a list of synthetic (man-made) chemicals that the government thinks are harmful. If a product contains a chemical that is on the list, the product must carry a warning label. If an individual or organization thinks a company is not complying, these private parties are authorized to sue, or in effect prosecute the company under the so-called bounty-hunter provision, which offers generous rewards if the hunter wins and imposes no penalties if he loses. Of course, Proposition 65 is much more complex than this; so complex, in fact, that it has brought in more than $50 million to law offices in California alone. The law has even spawned an industry of specialty newsletters, including *Prop 65 News* and the *Prop 65 Litigation Reporter*.

The key to Proposition 65 is the Governor's List of Carcinogens and Reproductive Toxins, because the warning label requirements only kick in once a chemical is on the list. Since other states may soon be asked to consider a Proposition 65 measure, it is important to have a thorough understanding about that all-important list.

Only man-made chemical "carcinogens" and reproductive toxins are eligible to be included on the list. Naturally occurring chemicals, even though shown to be animal carcinogens, are exempt. While that may appeal to our populist and environmentalist emotions, the scientist in us should be appalled at these haphazard rules. Consider two things: First, why are only man-made, not naturally occurring chemicals, tarred as dangerous, and second, at what level of exposure to these chemicals is there actually a risk?

"Yet Proposition 65 mandates that even the lowest detectable amount of a man-made chemical that is a 'rodent carcinogen,' may be enough to trigger a warning label."

Every year, the American Council on Science and Health (ACSH) publishes a holiday dinner menu which lists rodent carcinogens found in natural foods traditionally served at a holiday dinner. One says "rodent carcinogens" because the great majority of these "carcinogens," like their man-made counterparts on the Proposition 65 list, are known to increase the risk of cancer only when given to laboratory animals in high doses. There is no evidence, however, that low levels of exposure to these chemicals cause cancer in rodents, let alone humans. According to ACSH President Dr. Elizabeth Whelan, "The abundance of natural animal carcinogens is clear evidence of why trace levels of man-made chemicals that cause cancer in lab animals when given in large amounts should not be of concern to humans."[3] Yet Proposition 65 mandates that even the lowest detectable amount of a man-made chemical that is a "rodent carcinogen," may be enough to trigger a warning label.

Perhaps the clearest example of Proposition 65's contempt of basic scientific principles is the fact that it targets synthetic chemicals regardless of their amount. Yet the National Academy of Sciences points out that "the nature and extent of the toxic effect depends on the dose of the chemical."[4] Nonetheless, if any trace level of the chemical can be detected, the proposition kicks in.

"Since 1988, the litigators have interfered with almost 4,000 separate businesses, and plaintiffs have collected well over $25 million dollars, mostly from settlements."

The ACSH menu refers to such wholesome foods as broccoli spears and white bread, with their naturally-occurring carcinogens, allylisothiocanate and furfural, respectively. These natural chemicals, which exist even in organically grown foods, are sometimes more potent in terms of carcinogenicity than some man-made chemicals. Not to fear, ACSH reminds us; you would have to eat 82,600 slices of bread per day to equal the amount of furfural that increased the risk of cancer in rodents.

Science aside, bounty hunters are having a field day with Proposition 65. In fact, the law has cultivated a whole new breed of organizations that exist for the purpose of suing businesses who may not be in compliance with Proposition 65's strict and complicated requirements. Since 1988, the litigators have interfered with almost 4,000 separate businesses, and plaintiffs have collected well over $25 million dollars, mostly from settlements, according to *Prop 65 News*. One group, aptly named "As You Sow," has reaped millions thanks to Proposition 65, burdening businesses and Californian consumers with costly lawsuits.

One might say, "if there is any potential risk, spare no expense, label it!" But, if everything is labeled as potentially dangerous, how can we tell real dangers from phony ones?

Most importantly, the bounty hunter lawsuits do nothing to protect the public health. Rather, with Proposition 65 in their holsters, these new-age bounty hunters, motivated by personal gain, and perhaps an illogical bias against technology, seek to litter our world with cancer warning labels on the most benign products, so long as they are not a product of mother nature.

Jeff Stier is the Associate Director of the American Council on Science and Health.

---

1 Proposition 65 type legislation has been introduced in Connecticut, Hawaii, Massachusetts and the U.S. House of Representatives. (Source: Warning: California's Prop. 65 is an Economic Health Hazard. Marc Ullman,

2 Proposition 65 is codified in the California Health and Safety Code as Sections 25249.5 through 25249.12.

3 "Science Group Applauds Healthfulness of American Food- in spite of carcinogens". American

4 National Academy of Sciences: Carcinogens and Anticarcinogens in the Human Diet. Washington, D.C. National Academy Press; 1996.

The "Tulloch Rule": Micromanaging Private Property

by M. Reed Hopper

Perhaps the worst regulation of this decade is the so-called "Tulloch Rule," an extreme interpretation of the Clean Water Act that prohibited—until it was unanimously struck down by a federal appeals court—even minuscule soil movement in a "wetland" unless authorized by permit.

What began with a North Carolina landowner seeking to drain and clear "wetlands" on his property, in accordance with existing regulations, resulted in the adoption of an unprecedented rule by the Army Corps of Engineers. Under the guise of regulating the "discharge of dredged material" this outrageous rule could be used to require an individual to obtain a federal permit to ride a bicycle across a wetland. Likewise, a landowner could be barred from cutting down a tree in a "wetland" as this would be deemed a discharge of prohibited material.

"This outrageous rule could be used to require an individual to obtain a federal permit to ride a bicycle across a wetland."

As part of a 1993 court settlement between the Corps and a coalition of North Carolina environmental activists, a settlement to which the landowner himself was not a party, the "Tulloch Rule" broadened definitions, repealed exemptions and required the Corps to enforce section 404 of the Clean Water Act under the most severe and inflexible of terms.

The Tulloch Rule, expanded the definition of "discharge of dredged material," to read:

> "Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation."[1]

Thus, the "Tulloch Rule" would cover all soil movement or discharges, no matter how minuscule (with only minor exceptions), whereas before minimal soil movement or discharges were exempted. According to the Corps, the "Tulloch Rule" required a permit even when a bucket used to excavate material from the bottom of a river, stream, or "wetland," is raised and soils or sediments fall from the bucket back into the water.

By requiring a permit for "any redeposit" of soil in a "wetland," the newly minted "Tulloch Rule" gave the Corps unprecedented control over local land use—a result never intended by Congress. The broad scope of this redefined regulatory authority over land use becomes apparent when one considers estimates that nearly 5% of the total land surface of the lower 48 states comprises "wetlands" and that approximately 75% of the "wetlands" in the United States are privately owned.

"The Clean Water Act has become the government's primary source of power to regulate these 'water bodies' that include puddle-sized depressions which are barely wet for a week each year."

It is also noteworthy that when the Corps defined "navigable waters" under Section 404 of the Clean Water Act to include "wetlands," the act made no mention of "wetlands." It does so now only in passing. But the Clean Water Act has become the government's primary source of power to regulate these "water bodies" that include puddle-sized depressions which are barely wet for a week each year.

After years of heavy-handed application of the "Tulloch Rule," the National Mining Association sued the Corps arguing the Corps had exceeded its regulatory authority under the Clean Water Act. In defense of the rule, the Corps claimed it had a right to regulate pollutants added to U.S. waters. Since soils that fall back into the water after being removed become "pollutants" upon removal, the Corps argued that they can be regulated.

But in June of 1998, the United States Court of Appeals for the District of Columbia Circuit struck down the "Tulloch Rule" stating the government's novel argument "is ingenious but unconvincing." The court agreed with the National

Mining Association that a straightforward reading of the Clean Water Act "cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back"[2] and held the Clean Water Act "simply will not accommodate the Tulloch Rule."

But even after the court invalidated the "Tulloch Rule," the government was not willing to yield. Instead, the Corps doggedly argued that even if the "Tulloch Rule" was found illegal, the Corps should only be prohibited from applying the rule to the parties in this one case; it should not be prohibited from applying the "Tulloch Rule" nationwide. In answer to this self-serving argument, the court of appeals stated that when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated - not simply that the court forbids their application to particular individuals. Consequently, the court issued a nationwide injunction against the "Tulloch Rule."

Overreaching on wetlands regulations by federal environmental agencies continues to be a serious concern. Congress needs to look more closely at these agencies to ensure they don't exceed the scope of their authority.

M. Reed Hopper is a principal attorney with the Pacific Legal Foundation and chair of the foundation's working group to challenge illegal and abusive regulation.

---

1 33 CFR 323.2(d)(1)(iii)

2 1998 WL 321064, National Mining Association v. U.S. Army Corps of Engineers, (C.A.D.C. 1998).

About IPI

The Institute for Policy Innovation (IPI) is a non-profit, non-partisan educational organization founded in 1987. IPI's purposes are to conduct research, aid development, and widely promote innovative and non-partisan solutions to today's public policy problems. IPI is a public foundation, and is supported wholly by contributions from individuals, businesses, and other non-profit foundations. IPI neither solicits nor accepts contributions from any government agency.

IPI's focus is on developing new approaches to governing that harness the strengths of individual choice, limited government, and free markets. IPI emphasizes getting its studies into the hands of the press and policy makers so that the ideas they contain can be applied to the challenges facing us today.

Nothing written here should be construed as necessarily reflecting the views of the Institute for Policy Innovation, or as an attempt to aid or hinder the passage of any bill before Congress.

About the Lexington Institute

In 1775 a handful of citizen-soldiers stood on Lexington Common and defied the military might of the most powerful empire on earth. They made a stand to secure their rights as free men in an unprecedented democratic experiment. In doing so, they began a revolution that continues today — a revolution that advances freedom, opportunity, and equality before the law for all men and women.

It was no accident that the patriots of Lexington made their stand on the Common, the heart and symbol of their community since its founding by Puritans in the early eighteenth century. Every community that has meaning to its members provides some common ground where they can meet to express their shared values and resolve their differences. The Lexington Institute participates on the common ground of American democracy, the political process that expresses the will of the people.

It is the goal of the Lexington Institute to inform and shape the public debate of national priorities in those areas that are of surpassing importance to the future success of democracy, such as educational policy, tax reform, cultural preservation, regulatory philosophy, and national defense.

The Lexington Institute believes in limiting the role of the federal government to those functions explicitly stated or implicitly defined by the Constitution. The Institute opposes the unnecessary intrusion of the federal government into the commerce and culture of the nation, and strives to find nongovernmental, market-based solutions to public-policy challenges. We believe a dynamic private sector is the greatest engine for social progress and economic prosperity. And by promoting America's ability to project power around the globe we seek not only to defend the homeland of democracy, but also to sustain the international stability in which other free-market democracies can thrive.