In This Issue

National Debt Limit Countdown

On August 2, Treasury Secretary John Snow urged Congress to raise the federal debt limit without delay, and warned that the limit will be reached by late September or early October.

Others have speculated that gimmicks can be used to keep from reaching the limit until mid- or late November. One way that has been used in the past is not making scheduled payments into the Federal Employee Retirement System pension fund and after the ceiling is raised, repaying the "borrowed" amounts (with interest). This would allow action on the debt limit to be postponed until after the election.

Following is a brief Q & A about the debt limit.

What is the debt limit?
The debt limit or ceiling is the legal amount -- set by statute -- up to which the government can go into debt. Currently it is set at $7.384 trillion. Increasing debt over this limit is illegal.

What causes the national debt to grow?
Every time the government runs a annual deficit, meaning revenue is not sufficient to cover spending, it must borrow money, which increases the national debt. Record deficits have become the norm under this administration, because of a combination of factors: the economic downturn following 9/11, the war on terrorism, the Iraq war, and, perhaps most significant, the huge tax cuts in 2001 and 2003 that dramatically reduced revenue. The Office of Management and Budget recently estimated the deficit for fiscal year 2004 at $445 billion, adding $445 billion more to the national debt.

What happens if the debt limit is surpassed?
It is considered unthinkable that the U.S. Government would default on its debt. The catastrophic results would include chaotic bond markets and soaring interest rates. Thus, the debt ceiling will be raised. The only question is when, since raising the debt limit is a political hornet's nest, especially in an election year.

When was the last time the debt ceiling was raised?
It was last raised in May 2003 by a record $984 billion. Since Bush entered office in January 2001, the debt limit has been increased by more than $1.4 trillion.

For more about the national debt, see the U.S. Treasury's Q & A.

The International Monetary Fund released its annual report on the economic and fiscal condition of the U.S. It found that the administration's goal of cutting the deficit in half by 2009 was not ambitious enough, especially given the increasing pressure an aging population will soon be making on Social Security and Medicare. Rather, the IMF recommended getting the budget in balance by 2009 (without counting the Social Security surpluses). This would require "revenue

enhancements," or tax increases.

If you want to watch the debt grow by the minute, see the National Debt Clock.

Budget Legislation Watch

Some good and bad news from Congress before the August recess.

The good news:

Bipartisan bills were introduced before the August recess in both the House and Senate that would provide $6 billion in badly needed additional state fiscal relief over the coming year. However, the September schedule will probably be too full (and money too tight) to expect that Congress will act on them then. For more, see brief descriptions of S 2671 and HR 4961. Along with states, cities are facing difficult times and cutbacks in essential services. For more on this issue, largely being ignored by the presidential campaigns, see A War Against the Cities, an editorial by Bob Herbert which ran in the NY Times on July 30, 2004.

The bad news:

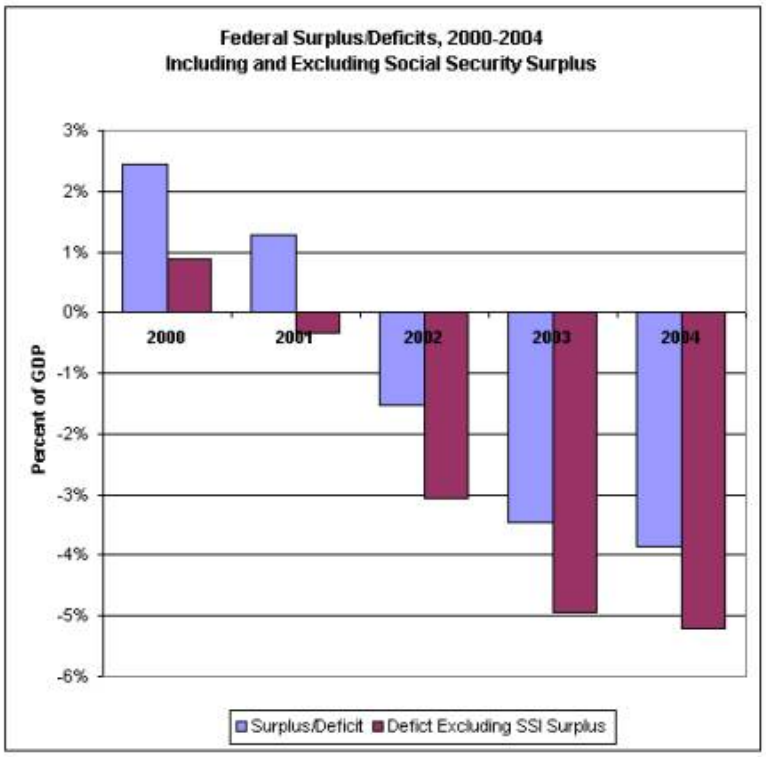
Also just before Congress recessed for August, Sen. Hatch introduced a companion (S. 2752) to Rep. Hensarling's budget process bill. The Hensarling bill includes an extreme "cap" or limit on entitlement spending, tight discretionary caps, and other harmful budget process changes. See a short summary of the Hensarling bill by the Center on Budget and Policy Priorities.

These budget process bills are also unlikely to move soon, despite their importance to so many Americans. Programs including healthcare, nutrition, childcare and child welfare, veterans benefits, and education may be saddled with crippling caps on entitlements and discretionary spending. See *Congressional Record* pages S8737and S8738 for the text of Sen. Hatch's introduction of the bill.

Mid-session Review Presents Misleading View of Nation's Finances

The White House's Office of Management and Budget recently (and belatedly) released its annual budgetary "Mid-Session Review," which attempts to put a positive spin on massive and worsening deficits, as well as the lowest level of revenue in nearly a half century.

Astonishingly the first paragraph in part reads "This Mid-Session Review reports solid progress toward cutting the deficit in half." Having read this statement, one might reasonably conclude that the deficit has begun to decline.



Alas, this is not so. Instead, our nation's economic policy has been fiscally irresponsible, and financially reckless.

The Mid-Session Review shows the federal budget running a $445 billion deficit for fiscal year 2004, up from a $375 billion deficit in 2003. But when the Social Security surplus is appropriately excluded, the current deficit will reach $600 billion, or 5.2 percent of GDP. (See chart below.) While temporary deficits can help the economy recover from a recession or allow us to invest in our future; unless significant policy changes are made, massive deficits are projected to persist.

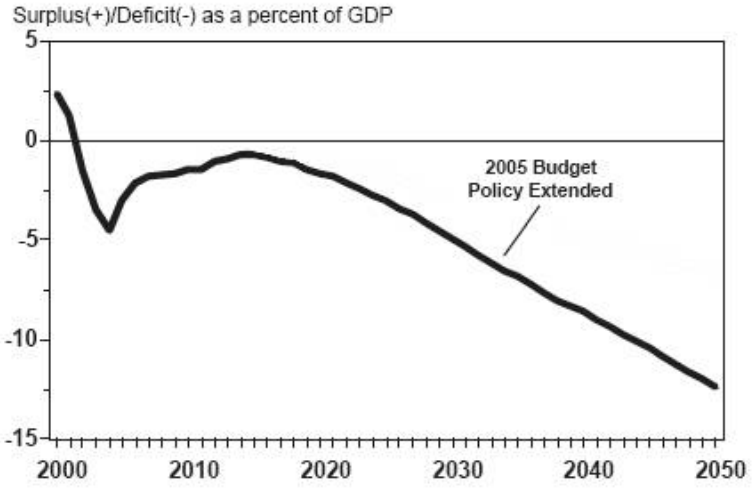
In addition, federal revenue, at just 16.2 percent of gross domestic product is at its lowest level since 1959. It doesn't take a Ph.D. in economics to know that tax changes that lead to historically low revenues just may have something to do with the deficit.

So, things haven't gotten better, but what about the near future?

Over the period from 2004-2009, the White House projects that $1,727 billion will be added to the federal debt. Yet even these projections do not include many of the policy proposals being pushed by the president and considered by Congress, including a permanent fix of the Alternative Minimum Tax and the elimination of the estate tax for multi-millionaires. If enacted, these policies would add hundreds of billions to the deficit projections.

Okay, so the near future doesn't look good, we will grow our way out eventually, right? Well, as one might expect, there is a reason why the president's budget and the Mid-Session Review only publish data for the next 5 years rather than project for a 10-year horizon as was done by previous administrations.

The budgetary situation becomes even worse -- not better -- when looking out over the next 10 years and beyond. The chart below, derived from the president's own budget (Analytical Perspectives, pp. 192-196) demonstrates that the budget situation will deteriorate significantly over the coming decades.



With the retirement of the baby-boom generation, increases in expenditures for Social Security and Medicare will combine with massive deficits and low revenue to put an extreme squeeze on the rest of the budget. The squeeze will ultimately impact many essential governmental areas, including education funding, student loans, services for families and children, funding for parks and historic preservation, highway and transportation funding and many other programs of vital importance to the American public.

So what's to blame for the deficits? Many Americans would be surprised to learn that of all the legislation enacted since the 2001 projections were made, tax changes account for 57 percent of the increased deficit -- more than both the wars in Iraq and Afghanistan, all homeland security spending, and other spending changes *combined*.

By not planning for the future, recent economic policy has been irresponsible, because it shifts trillions of dollars of the tax burden to future generations, and away from those that can best afford to pay.

In addition, we have lost an important opportunity to use a budget surplus to address some of the most pressing and most difficult policy challenges, including the viability of Social Security or Medicare. According to the Tax Policy Institute, the total present value of all the revenue lost by the tax changes over the past three years would be more than enough to shore up Social Security for the next 75 years.

Finally, this kind of tax policy is extremely reckless because it threatens our ability to respond to future crises and challenges -- such as another terrorist attack on the order of 9/11 -- and if it continues, it may very well endanger the financial health and stability of the nation.

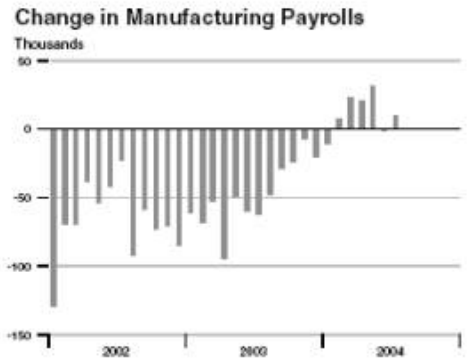
Economy and Jobs Watch: Economy Shows Signs of Weakness under Pressure

Two recent economic reports on jobs and gross domestic product (GDP) indicate that the economy is showing some signs of weakness. The economy will begin to be under increasing pressure from higher oil prices, rising interest rates, and a ballooning deficit. Over the period from 2004 to 2009, the White House projects that $1,727 billion will be added to the federal debt -- and this projection does not include many policy proposals favored by the President and many in Congress which would increase the deficit even more.

Employment

The job market showed an extremely weak and disappointing gain of just 32,000 jobs in July -- well below expectations as well as below the level needed to keep up with the growth of the labor force. The measured unemployment rate however, did decline very slightly by one tenth of a percentage point to 5.5 percent.

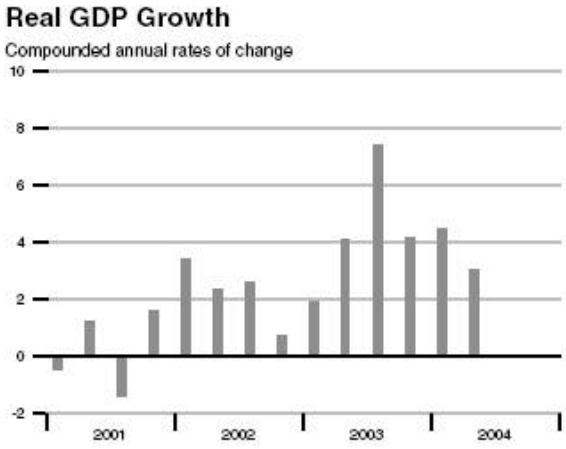
The weak labor market is also having a toll on salaries. According to the Economic Policy Institute, "For those lucky enough to land a new full-time job, the median pay rate fell from $681 per week in their old job to $572 per week in their new job."



Source: St. Louis Federal Reserve, National Economic Trends, 8/6/04

Gross Domestic Product

In addition the nation's economy as measured by the gross domestic product (GDP) grew at a disappointing 3.0 percent annual rate in the second quarter of 2004, the Bureau of Economic Analysis announced. This growth rate is the lowest since the first quarter of last year (see graph below).



Source: St. Louis Federal Reserve, National Economic Trends, 8/6/04

Particular weakness was seen in consumer spending, which had been the strongest part of the economy through the 2001 recession and afterwards and which grew at its slowest pace since early 2001 -- at an annual rate of just 1 percent.

This recent data demonstrates that the economic policies currently in place are not getting the job done, and that neglect of the domestic macroeconomic situation can have real consequences for the job market and the overall economic situation.

As a recent report from Economy.com, an economic consulting and forecasting firm, stated about the Bush economic

policy record, [t]he economic bang for the buck from these policies. . . has been substantially lacking. The report in part concluded, [i]t is not difficult to construct a package of alternative fiscal policies that would have lifted the moribund economy much more quickly and powerfully.

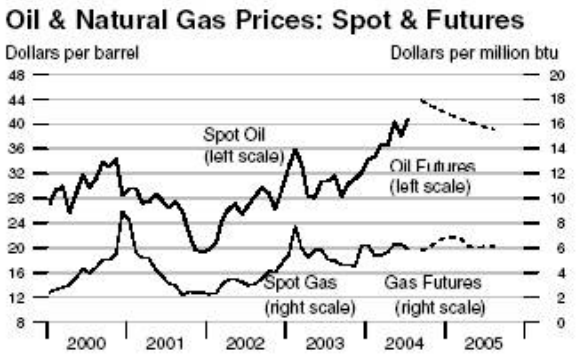
Mounting Pressures

Growing Federal Budget Deficit

According to OMB, the fiscal year 2004 deficit is set to reach $445 billion, and $1,727 billion will be added to the federal debt over the period 2004-2009. If a permanent fix of the Alternative Minimum Tax and additional tax changes such as the elimination of the estate tax for multi-millionaires are enacted, the deficit projections would be even worse.

Oil prices

Oil prices have continued to rise, rising well above the $40 level. This "oil tax" presents a real drain on the domestic economy, and has likely contributed to the recent weakness, especially in consumer spending.



Note: Futures prices as of 08/02/2004.

Source: St. Louis Federal Reserve, National Economic Trends, 8/6/04

Interest rates

While interest rates have risen slightly in recent months, the housing market remains strong. However, this boom is likely to be temporary since the threat of even higher interest rates in the future probably led many people to jump into the market or to speed up their home-buying plans. Further increases in interest rates pose a significant threat to the economy over the next year.

The Federal Reserve was expected to raise rates again at their August 10th meeting of the Federal Open Market Committee, but recent data suggests they may postpone any increase.

Ohio Proposes Strengthening Open Records Law

Officials in Ohio will soon introduce a bill to the state legislature that would improve the state's current open records laws, according to the *Plain Dealer*. This comes after a recent survey revealed the state complied with requests for records less than half the time.

The new provisions would require elected officials to receive two hours of public records training and government offices to create records manuals. Judges could also fine those violating the law up to $1,000 a day. While these changes could greatly improve compliance with the laws, some believe it is not enough.

Ohio State Sen. Marc Dann (D-Youngstown) wants a fixed response time for any requests. This would require government offices to respond to requests within a set number of days. The federal Freedom of Information Act requires a response within 20 working days. Another improvement advocated by the Ohio Newspaper Association would mandate that plaintiffs who win lawsuits under open records laws automatically be awarded attorney's fees. This is similar to a law Illinois adopted last year. The promise of recovered costs would encourage more lawyers to take up open records cases pro bono. Currently, judges can decide whether or not to award these fees.

This new bill comes after the Ohio Coalition for Open Government conducted a statewide audit seeking public records. The results showed that requests were granted in a timely manner only half the time. In the rest of the cases, requests were denied, delayed, or additional information was requested that is not required by law. In the Cleveland area, requesters of records faced hassles two-thirds of the time.

Ask Your Representatives to Investigate the Data Quality Act

OMB recently published a report to Congress that analyzes and summarizes the first year under the Information Quality Act (IQA). The IQA, commonly known as the Data Quality Act, requires agencies to produce guidelines to ensure that information they use is of high quality. OMB Watch responded with an analysis, which found OMB's report presented Congress with misleading and incorrect facts. Congress never had a hearing on the law, and in light of the OMB report, it is now time for congressional oversight.

To contact your representatives and find out more information, read OMB Watch's action alert.

Justice Dept. Asks for Destruction of Documents, Later Rescinds

The Department of Justice (DOJ) called for the destruction of all copies of five documents in library circulation, according to a July 20 message from the Superintendent of Documents. After public outcry from libraries and public interest groups, DOJ rescinded its request in a July 30 message.

Although these training materials and other documents were already in the public domain, DOJ asserted that they were not appropriate for external use. One of the listed documents is a public law and law offices commonly use the others in assisting clients to reclaim assets from the government.

After the public backlash, the Superintendent released a second message saying, "In response to the Government Printing Office's further inquiry into this matter, the Department of Justice has requested that I advise depository libraries to disregard the previous instructions to withdraw these publications." DOJ determined that documents already in the public domain were not of a sensitive enough nature to require removal. Neither letter provides a precise definition for the term "sensitive."

Given the atmosphere of secrecy at DOJ these actions alarmed information advocates. Last year, the General Accounting Office (GAO) released a report saying, a significant percentage of Freedom of Information Act (FOIA) officers have reduced the amount of information available to the public because of Attorney General John Ashcroft's infamous October 2001 memo. However, removing documents from libraries is an even more forceful effort at secrecy then denying requests.

The five documents titles are:

- Civil and Criminal Forfeiture Procedure
- Select Criminal Forfeiture Forms
- Select Federal Asset Forfeiture Statutes
- Asset forfeiture and money laundering resource directory
- Civil Asset Forfeiture Reform Act of 2000 (CAFRA), PL no. 106-185, 114 Stat. 202 (2000)

FBI Punishes Whistleblowers

Another former employee of the Federal Bureau of Investigations (FBI) has come forward to blow the whistle on perceived failings and misconduct within the agency. Mike German, a 16 year veteran of the FBI, recently went public with accusations that the agency mismanagement a terrorism investigation. The case is being investigated but it is unclear how far the investigation will go given last month's dismissal of another FBI whistleblower case.

New FBI Whistleblower

German claims that after many years of successfully infiltrating dangerous and criminal organizations, his efforts to investigate an American group reportedly planning to support foreign terrorists was botched by the FBI. The ex-FBI agent also accused the agency of falsifying documents to discredit sources. Finally German says the FBI punished him for raising his concerns to FBI officials by freezing him out and making him an outcast in the agency which led to his leaving the FBI after 16 years of service.

The Justice Department's Inspector General has begun investigating German's case, both his accusations of mismanagement and claims of retaliatory treatment. A F.B.I. spokesperson, claimed that the FBI "thoroughly investigates all allegations of wrongdoing." However, German may have cause for concern considering how the last FBI whistleblower case was handled.

Last FBI Whistleblower

Sibel Edmonds, a former FBI translator, accused the FBI of firing her for complaining major security lapses in the agency's translation service. Specifically, Edmonds claimed that supervisors intentionally slowed her work in an effort to receive budget increases and that inaccurate and shoddy translations were being done. The former translator also reported that an employee with ties to a foreign embassy attempted to shield a foreign official by leaving information out of translations. The FBI has acknowledged that the translator in question, who has since quit and now lives in Belgium, belonged to a Turkish organization being investigated by counter intelligence and that several of her translations missed significant pieces of information.

Edmunds raised these concerns reputedly with FBI officials and was fired. The FBI reported that her contract was terminated completely for the government's convenience, while it took extreme steps to gag her at the same time. In

May, the FBI retroactively classified three letters to Congress concerning Edmunds that had been publicly posted on Congressional websites for sometime. One letter remains on Sen. Charles Grassley's (R-IA) website; Grassley is a member of the Senate Judiciary Committee which oversees the FBI. The Memory Hole, a website that attempts to preserve public access to material, has reposted the other two letters. The FBI also invoked its rarely used state-secrets privilege to block Edmunds from testifying in a civil case brought by the relatives of 9/11 victims.

Last month a federal judge dismissed Edmunds' whistleblower lawsuit without much explanation. The Judge only stated that he was satisfied with claims by Attorney General John Ashcroft and a senior FBI official that the suit could expose state secrets, damage national security, and disrupt diplomatic relations with foreign governments. However, after a classified investigation, the Justice Department's Inspector General found that Edmunds's accusations "were at least a contributing factor in why the FBI terminated her services." The investigation also revealed that the FBI did not aggressively pursue the accusations. The *New York Times* obtained and reported on a July 22 letter from Robert S. Mueller III, Director of the FBI, to Congress that explained these conclusions and informed lawmakers the agency was considering disciplinary actions against some employees.

Data Quality Challenge Helps Bump Species from Consideration for Endangered List

On March 31, 2003 the U.S. Fish and Wildlife Service (FWS) of the Department of the Interior received a data quality petition from Terry Bashore of the U.S. Air Force challenging information concerning FWS' proposed rule to list slickspot peppergrass as an endangered species. The challenge clearly contributed to the FWS' decision to withdraw its proposal to recognize and protect the plant as an endangered species.

Slickspot peppergrass is a flowering plant unique to Idaho. It appears there is no specific purpose or use for the plant, simply that it is a rare flower that is being threatened with extinction by non-native weeds caused by livestock trampling and grazing, road construction and off road vehicles. The grass grows in "slickspots," which are small areas within larger sagebrush habitat. The total area of sagebrush steppe habitat containing occurrences of slickspot peppergrass is about 20,500 acres. Not all of this area is slickspot peppergrass -- just small areas within it. Of that area, 91 percent is federal land managed by the Bureau of Land Management (BLM) and U.S. Air Force (USAF); 3 percent is private land; 6 percent is state land.

In 1999 FWS determined that the rare plant was a candidate for the endangered species list but took no additional action. Western Watersheds Project and the Committee for the High Desert filed a Nov., 2001 lawsuit for the agency's failure to list the plant under the Endangered Species Act and a federal-court settlement required the FWS to make a final decision by July 15, 2003.

On July 15, 2002 (a year earlier) FWS published a proposal to list the plant on the endangered species list. During consideration of the proposed rule FWS provided two public comment periods for a total of four months which ended in Nov., 2002 and held two public hearings . In the proposed rule to list the plant FWS asserted that the rate of disappearance of slickspot peppergrass is "the highest known of any Idaho rare plant species."

Request for Correction

Bashore, Chief Ecologist and Range Liaison at Langley Air Force Base in Virginia, asserted in the data quality challenge that there was a lack of scientific evidence to support the claims, as well as a lack of scientific peer review for the support research. However, Western Watersheds Project reports that Jeff Foss, supervisor of FWS' Snake River Basin Office in Idaho, stated that five peer reviewers supported the "sufficiency and accuracy" of the science and the listing of slickspot peppergrass as endangered.

The Air Force petition also claimed that FWS used inaccurate, confusing and misleading presentation of arguments for listing the species. Additionally, Bashore's challenge raised questions about the taxonomy of the plant species and the sufficiency of the population surveys.

Interestingly, the Air Force is an affected party in this matter because apparently training operations at Mountain Home Air Force Base in Idaho would be severely affected if slickspot peppergrass were listed under the ESA.

The request was filed four moths after the second comment period for the proposed rule closed. It is not clear what new information the Air Force had that it couldn't submit during the two public comment periods or at either of the two public hearings.

Agency Response

On July 10, FWS sent Bashore a response to his challenge, notifying him that the date of resolution for the rule would be extended. Shortly thereafter, on July 18, three days after the court appointed deadline, FWS announced a six-month extension to the final rule and a third public comment period. FWS asserts this was not just in response to the data quality challenge but because "substantial disagreement regarding the sufficiency and interpretation of the available data" existed. However, FWS clearly acknowledges in Frequently Asked Questions About Slickspot Peppergrass" that the additional scientific input from the Air Force prompted the re-review.

Appeal

The Air Force submitted a request for reconsideration on August 1 claiming that the extension of the rule and reopening of the public comment period did not "correct" the FWS Notice to List the species as endangered. Apparently additional subsequent communications occurred between the FWS and the Air Force on the matter of the data quality appeal. However, it is unclear what information was exchanged during these communications.

Agency Response to Appeal

On Sept. 3, FWS notified the Air Force that no direct action would be taken on their appeal and that reopening the comment process was an adequate response to their challenge, as it would enable comments regarding data quality to be considered. The Service also noted that a response would be provided in the final rule. However, there was no final rule.

Instead, on Jan. 22, 2004, FWS announced that it was withdrawing the rule to list slickspot peppergrass as an endangered species. The FWS cited the lack of strong evidence of the plant's decline and that conservation agreements, established during the most recent delay, would sufficiently protect the plant. No explanation was given for why the evidence had been strong enough to initially propose listing the plant as endangered or what exactly had changed besides the obviously biased objections of the Air Force.

This is a case where a questionable policy may have allowed political pressure to endanger the very existence of a species. Environmental groups are concerned that conservation agreements, which do not have nearly the force of law as being listed as an endangered species, will not be adequate to protect the plant. Western Watersheds Project already reports that it expects to litigate over the FWS' decision to not list the species.

Sign up for OpenTheGovernment.org Updates on Secrecy

With new proposals to expand government secrecy emerging weekly, it's hard to keep up with it all. To wit: The transportation spending bill working through Congress could allow officials to hide hazardous waste hauling through communities across the U.S. One piece of legislation would expand the Patriot Act, another would make permanent sections of the Patriot Act set to expire in 2005, yet a third would restore civil liberties protections for libraries and bookstores asked to divulge their patrons' reading habits. The Department of Homeland Security may propose plans to hide unclassified information even as some Republican members of Congress charge federal agencies keep too many secrets. All this and more was covered in the OpenTheGovernment.org Weekly Update.

OpenTheGovernment.org is an unprecedented coalition of journalists, consumer and good government groups, environmentalists and labor. Our goal is to translate public concern about closed government into public voices for open government. Check out the latest news and updates and sign up for alerts about open government at www.OpenTheGovernment.org. It's quick. It's easy. And it will help open the government.

Terror Prevention and Nonprofits: CFC Policy Raises Concerns about Chilling Impact

The Director of the Combined Federal Campaign (CFC) announced July 31 that participating organizations have an affirmative obligation to check government terror watch lists in order to comply with a certification they are required to sign that they do not support terrorism. The statement prompted the American Civil Liberties Union (ACLU) to withdraw from the fund. In a letter to the CFC, ACLU Executive Director Anthony Romero said, "that requirement is not clear from your certification and I am sure that most if not all of the 2,000 participating charities have a different practice and understanding of the CFC requirements." OMB Watch released a statement on August 6 calling on CFC to withdraw the certification requirement.

The certification states that the group "does not knowingly employ individuals or contribute funds to organizations found on the following terrorist related lists promulgated by the U.S. Government, the United Nations, or the European Union." It names three specific lists (see below) and requires the group to notify CFC of any change within 15 days.

The ACLU letter noted that the government's terror watch lists are "notoriously riddled with error and do not provide individuals with a means to correct false information." In April they sued to block use of "no-fly" lists on constitutional grounds, citing the experience of one of their staff attorneys, who is of Middle Eastern descent, and whose name mistakenly appeared on the list.

In February the *Washington Times* reported that a master terror watch list had been created by the government in December to be used by the Transportation Safety Agency as a "no-fly" list. Michael McMahon, a federal employee whose name matched one on the list, was detained for 45 minutes at Dulles International Airport and questioned about alleged ties to the Irish Republican Army. A *Washington Times* search found more than 20 people with the same name in Virginia and Maryland.

Mara Patermaster, the CFC Director told the *New York Times* that, "We expect that the charities will take affirmative action to make sure they are not supporting terrorist activities," assuming appearance of an employee's name on one of the lists means charitable resources are being diverted to terrorism, a highly questionnable assumption.

The negative impact of the new policy is likely to extend beyond the 2,000 charities participating the CFC. Other funders, such as United Way, often require nonprofits to meet CFC requirements. For example, the application for the District of Columbia United Way requires nonprofits to sign the same certification.

Summary of Combined Federal Campaign Regulations 5 CFR Part 950- Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations

The regulations define the Combined Federal Campaign (CFC) program and establish a structure to carry it out. Definitions, a conflict of interest policy and prohibition on discrimination are found in Subpart A. It notes that the CFC is "the only authorized solicitation of employees in the Federal workplace on behalf of charitable organizations." It runs a six-week campaign between September 1 and December 15 each year, with eligible organizations seeking to have donations designated for them.

CFC is part of the Office of Personnel Management.. The regulations authorize the CFC director to take all necessary steps to achieve campaign objectives and to hear all disputes. The director's decisions are final for administrative purposes.

The director establishes Local Federal Coordinating Committees comprised of federal officials that is responsible for overseeing the local campaign, which is carried out by a Principal Combined Fund Organization, made up of charities, federations or a combination of the two.

Federal employees designate charities from national or local lists to receive their contributions. Eligibility requirements for appearing on the list include a requirement that the group be a 501(c)(3) charity, conduct lobbying activities as defined under the expenditure test in Section 501(h) of the tax code and meet public accountability standards. Theses standards do not include any certification regarding checking terrorist watch lists. They do include certifications on fiscal accountability, such as an audit requirement, and limits on the proportion of administrative costs in a group's budget and a commitment that contributions will be used for the purposes described in the promotional information.

The director may impose sanctions, up to permanent expulsion, on organizations for "violating any provisions, other applicable provisions of law, or any directive instruction from the director." In such a case the organization has ten days to submit a written statement on why the sanction should not be imposed. There is no further administrative appeal.

Muslim Charity Says FBI Fabricated Evidence, 8 Indicted

On July 26, the Holy Land Foundation for Relief and Development, the nation's largest Muslim charity, sent a letter to the Department of Justice Inspector General to investigate FBI's handling of case, alleging "materially misleading" evidence. Later the same day the Justice Department unsealed an indictment of the charity and seven top officials, charging material support of Hamas, a designated terrorist organization, and money laundering.

Holy Land was shut down by the federal government in late 2001 and was unsuccessful in a lawsuit challenging the freeze order. (See the OMB Watch Executive Report for details.) A lawyer for the foundation said the court relied on secret evidence, including a 54-page FBI memorandum it claims had distorted and erroneous translations of Israeli intelligence reports. An independent translating service hired by Holy Land found 67 discrepancies and errors in a four-page FBI document used in that case.

The complaint describes several instances of incorrect or misleading information, including mention of Holy Land's financial support for Al Razi Hospital, claimed to have Hamas affiliations. The memo did not disclose that the U.S. Agency for International Development also funded the hospital.

A central issue in the case will be whether funding charities or other groups that have ties to terrorist organizations amounts to funding terrorism. If indirect ties can lead to criminal prosecution many international funders may be reluctant to make grants to troubled areas of the world. The Treasury Department's Office of Foreign Assets Control has issued "voluntary" best practice guidelines that would require grantmakers and service providers to investigate their clients and grantees to ensure they have no ties to terrorism. The guidelines have been criticized for putting foundations in the role of government enforcers.

Senate Finance Committee Asked to Consider Financial Burden of Reform Proposals

Comments by lawyers and accountants to the Senate Finance Committee at a July 22 Roundtable pointed out the financial and administrative burdens some staff reform proposals could impose on nonprofits. Some comments targeted a proposed IRS five-year review of each organization's tax-exempt status.

Among other ideas, the staff proposal would require nonprofits to file detailed information with the Internal Revenue Service (IRS) every five years showing that it continues to operate for tax-exempt purposes. Both the American Bar Association's Section on Taxation (ABA) and the American Institute of Certified Public Accountants (AICPA) said the costs of these reviews are likely to exceed the benefits. AICPA's remarks said, "In general, we support review by the IRS to ensure that exempt organizations are carrying out the purposes for which they were recognized as exempt. However, we are concerned that the five-year review proposal will require all organizations required to apply for tax-exempt status to prepare a great deal of information that the IRS will not have the resources to review." The ABA questioned whether the proposal is practical or possible, noting that over 1.6 million nonprofits would fall under the requirement. AICPA said, "We cannot commend changes that will impose financial burdens on all exempt organizations as a result of the acts of a few."

The staff proposed fees on nonprofits to pay the costs of the increased oversight. AICPA opposed this, saying, "The AICPA suggests that any increased enforcement would be better funded from the excise tax on the investment income of private foundations, which was imposed for this purpose, rather than diverting funds from the charitable uses for which they were donated."

Senate Finance Committee Chair Charles Grassley (R-IA) and Ranking Member Max Baucus (D-MT) send a letter to the Statue of Liberty Foundation seeking more information on governance issues. The committee began investigating the foundation in the spring after press reports that the foundation and National Park Service had been slow in efforts to re-open the statue after the September 11, 2001 terrorist attacks in New York.

Uniform Financial Guidelines for Government Grants Proposed

A coalition of nonprofits has published draft *Uniform Data Elements and Definitions for Grant Budgeting and Financial Reporting"* for use by government grantees as part of the federal grant streamlining process. The coalition is seeking comments from nonprofits and their accountants by September 30. After the guidelines are modified to incorporate input a new version will be released for field-testing, and all grantees will be urged to try them.

The Uniform Guidelines Coalition includes OMB Watch, the Urban Institute, the National Council of Nonprofit Associations, the National Association of State Auditors, Comptrollers and Treasurers, and the Greater Washington Society of CPAs. Bill Levis of the Urban Institute serves as Project Manager.

The objective of the project is to facilitate creation of core summary budget data elements for use by both federal and state governments. Comments can be sent to Kay Guinane or Bill Levis. The OMB Watch website has more background information on government grant streamlining.

Update on Elections and Nonprofit Advocacy

Complaints filed against Jerry Falwell Ministries at the Internal Revenue Service (IRS) and the Federal Election Commission (FEC) allege that the organization illegally endorsed President Bush and solicited donations for a conservative political action committee. A bill to repeal the electioneering communications blackout of broadcasts referring to federal candidates within 60 days of an election or 30 days of a primary or convention is introduced in the Senate, as the Wisconsin Right to Life Committee sues to overturn application of the rule to their grassroots lobbying ads

Falwell Ministries Accused of Partisan Electioneering

In early July Jerry Falwell Ministries, a 501(c)(3) organization, posted an endorsement of President George Bush on its website and circulated it via an email newsletter, *Falwell Confidential*. Both messages included a solicitation of donations and link to a conservative political action committee, the Campaign for Working Families. Americans United for Separation of Church and State filed a complaint at the IRS July 15 requesting an investigation. On July 27 the Campaign Legal Center filed a complaint at the IRS alleging violation of the prohibition on intervention in elections for 501(c)(3) organizations and another complaint at the FEC alleging illegal general public endorsement and solicitation of contributions by a corporate entity.

Falwell responded that the communications were paid for by a 501(c)(4) entity, the Liberty Alliance and that he was speaking as an individual and publisher and is legally entitled to express his views. However, the communications were made using corporate facilities, including the groups' shared website, which does not clearly distinguish between the 501 (c)(3) and 501(c)(4) entities. It bears the name of the Jerry Falwell Ministries, the 501(c)(3), but in the About Us section says it is a project of the Liberty Alliance, the 501(c)(4).

The Campaign Legal Center asked the IRS to "use its authority under Section 7409 of the tax code to enjoin Jerry Falwell Ministries Inc. from engaging in further direct express endorsements of any candidates for public office."

Electioneering Communications Challenges

A bill introduced in the Senate on July 21 by Sen. Saxby Chamblis (R-GA), S. 2702, would repeal the electioneering communications provisions of the Bipartisan Campaign Reform Act of 2002. It has five co-sponsors and has been referred to the Committee on Rules. The bill would effectively eliminate restrictions on broadcasts that refer to federal candidates within 60 days of an election or 30 days of a primary or party convention.

On August 3, the Federal Election Commission accepted two Advisory Opinion requests seeking interpretation of the electioneering communications rule. The first involved Russ Darrow, a Republican candidate for U.S. Senate in Wisconsin. His request, AO 2004-31 seeks clarification on how the rule applies to advertisements for his business, which bears his name. The second request comes from Citizens United, whose request, AO 2004-30 seeks permission to air broadcasts publicizing a book about Presidential candidate John Kerry. The same group has previously filed a complaint against advertisements for Michael Moore's film *Fahrenheit 9/11*. On August 6, the FEC dismissed that complaint based on stipulations from Moore and the film's distributor that it had already planned to delete references to federal candidates from advertising during the blackout period.

The Wisconsin Right to Life Committee has filed a lawsuit challenging application of the electioneering communications rule to grassroots lobbying ads it is airing now and wants to continue to run this fall. The ads urge the public to contact Sens. Russ Feingold and Herb Kohl, both Democrats, to end the filibuster against President Bush's judicial nominees. Feingold is running for re-election. The suit seeks an injunction against application of the rule to these facts, even though the Supreme Court upheld the general provisions of the law in McConnell v. FEC in December 2003. Wisconsin Right to Life is a 501(c)(4) organization that has endorsed Republican candidates.

The three-judge panel considering the case held a status conference on August 5 and told the parties to attempt to negotiate stipulated activities that may eliminate the need for protracted litigation. The Wisconsin Right to Life Committee could use "hard" dollars, raised and spent subject to federal campaign finance regulations, to pay for the ads, but said they have only minimal funds in their regulated PAC account. The parties will report their progress to the court on August 9.

Mine Safety Subordinated to Mining Company Interests

A front-page story in the *New York Times* August 9 examined the Bush administration's record over the last four years of subordinating mine safety issues to the special interests of the mining companies, stressing in particular the role of former mining executive Dave Lauriski, who is now head of the Mine Safety and Health Administration.

Among the rollbacks of mining safety protections under Lauriski's leadership:

- A proposed change to allow coal-dust levels in mines to quadruple, thus putting miners at a significantly increased risk of black lung.
- Erasing from the rulemaking agenda a proposed rule to regulate the structure and condition of coal waste impoundments, which can hold hundreds of millions of gallons of toxic coal wastes. The rule had been added to the agenda in the aftermath of an impoundment rupture that released over 300 million gallons of hazardous coal slurry into rivers and streams in Kentucky and West Virginia.

OMB Watch has been monitoring and reporting on these developments throughout this time. Our recent report, *Special Interest Takeover: The Bush Administration and the Dismantling of Public Safeguards* (available here), documents the rollbacks of mine-related workplace and environmental protections and highlights the problem of the "foxes in the henhouse" -- former executives of the mining industry, including Lauriski, who have been tapped by the administration to serve in the agency intended to regulate that very industry.

OMB Watch has also compiled a chart of rules withdrawn from MSHA's agenda. This chart compares MSHA's rationales for adding the rules to its agenda against its explanation for withdrawing them.

Other recent OMB Watch dispatches on mine safety rollbacks include the following:

- Federal Judge Rebukes Bush Administration's Hard-Rock Mining Rules
- Administration Moves to Allow Dumping of Mining Waste Into Streams
- Court Ruling Overturned: Mining Companies Free to Bury Streams Once Again
- Court Rejects Move to Allow Dumping from Mountaintop Mining
- Administration Moves to Clear Way for Dumping, Mountaintop Mining
- Administration Lifts Restrictions for Dumping Mining Waste
- Safeguards Weakened or Revoked

OSHA, Congress Weaken Workers' Protections Against TB

According to a July 30 memo from OSHA Deputy Assistant Layne Davis to OSHA Regional Administrators, field officers for the Occupational Safety and Health Administration must contact OSHA's Enforcement Directorate before issuing a citation of violations of new respiratory protection requirements for tuberculosis. This requirement further enervates a system of safeguards that has been increasingly weakened over the past year.

Last December, OSHA withdrew a rule aimed at limiting occupational exposure to tuberculosis. In its explanation, the agency argued that "the rate of TB has declined steadily and dramatically since OSHA began work on the proposal in 1993," so the rule is no longer necessary. Furthermore, the agency claimed, "An OSHA standard is unlikely to result in a meaningful reduction of disease transmission caused by contact with the most significant remaining . . . risk: exposure to individuals with undiagnosed and unsuspected TB. . . ." [68 Fed. Reg. 75,767 (2003)]. Moreover, the agency stated that workers would still be protected from TB by the respiratory protection requirements, which requires the use of CDC-certified respirators by health care workers working with TB patients, under which OSHA could still cite employers for health violations. However, OSHA's actions show a lack of commitment to enforcing even the limited scope of the respiratory protection requirements.

Even if fully enforced, the respirator requirement does not cover the full range of activities that would have been covered under the proposed rule that was withdrawn from its rulemaking agenda. Anti-TB protections in that rule would have included "the use of respirators when performing certain high hazard procedures on infectious individuals, procedures for the early identification and treatment of TB infection, isolation of individuals with infectious TB in rooms designed to protect those in the vicinity of the room from contact with the microorganisms causing TB, and medical follow-up for occupationally exposed workers who become infected" (62 Fed. Reg. 54,160 (1997)).

Further debilitating the safeguards, on July 14 the House Appropriations Committee approved a rider to the 2005 Labor, HHS, and Education Appropriations bill that would prevent OSHA from enforcing the annual fit-testing provisions of the TB respiratory standard. According to the agency, fit-testing (testing respirators for proper fit) is necessary to ensure protection against tuberculosis microorganisms. "Selecting the proper respirator is a vital step in protecting a user against potential exposures and adverse health effects," according to OSHA administrator John Henshaw. Accordingly, OSHA issued a final rule in August providing for fit-testing on an annual basis, rather than the one initial fit test currently required. If this measure passes, OSHA's ability to enforce protective and preventative standards for occupational tuberculosis will be further weakened.

Court Rejects Cost Considerations in Clean Air Act ... Almost

In a confusing opinion, the D.C. Circuit has rejected a rule that would have allowed the use of two ozone-depleting chemicals in certain circumstances despite the designation of a non-depleting alternative. Although the decision was based in part on the improper consideration of costs to industry, the court nonetheless declined to make a definitive holding on the permissibility of cost considerations in the disputed section of the Clean Air Act.

About the Case

The case was brought by Honeywell International, maker of a hydrofluorocarbon (HCFC) approved as a substitute for an HCFC scheduled to be phased out in accordance with Title VI of the Clean Air Act, which implements the Montreal Protocol on Substances that Deplete the Ozone Layer. Although the Environmental Protection Agency approved Honeywell's HCFC, the EPA also issued a final rule permitting the continuing use of two other ozone-depleting HCFCs as additional substitutes for the phased-out HCFC whenever "technical constraints" prevented companies from using Honeywell's approved alternative in foam end-uses. EPA also declined to limit existing uses of the two ozone-depleting HCFCs because "there would be a significant impact on small businesses" if EPA limited their use and because mandating non-ozone-depleting alternatives "would be difficult and prohibitively costly."

The court did not address Honeywell's claim that EPA's 180-degree turn between the proposed rule and the final rule on limiting the two ozone-depleting HCFCs constituted a failure to provide adequate notice of the ultimate decision. Instead, after a lengthy treatment of Honeywell's standing to sue, the court concentrated on Honeywell's argument that EPA should not have considered economic factors in its decision. Although the court did rule that flaws in EPA's reasoning justified vacating the rule, its explanation for that decision leaves unclear the extent to which economic analysis is forbidden by Title VI of the Clean Air Act.

Diverging Rationales

The court was unanimous that EPA erred in issuing the final rule, splitting instead on the question of appropriate remedy. Judge Randolph's separate opinion, dissenting from the majority on the remedy question, also offered an alternative concurring approach on the rationale for rejecting EPA's rule. There are two important questions for the court:

- Did EPA's rule depend on economic considerations?
- If so, were those economic considerations permitted by the Clean Air Act?

Although both the opinion of the court by Judge Sentelle and the Randolph concurrence agree that economic considerations found their way into the final rule (differing only in the reasoning that leads to that conclusion), the opinions diverge significantly on the second question.

Economic Considerations

One point of divergence for the Sentelle and Randolph opinions is the meaning of the key term "technical constraints." EPA argued that the final rule permitted use of the two disputed HCFCs only when "technical constraints" prevented the use of Honeywell's non-depleting alternative. Because the rule limited those additional uses to cases of technical constraint, according to EPA, any discussion of economic considerations in its explanation of the rule should be treated as a harmless error that should not be the basis for rejecting the rule itself.

Sentelle rejected that argument, noting instead that technical feasibility is not necessarily categorically distinct from economic feasibility:

> The flaw in EPA's position is the assumption that technical constraints exclude considerations of economics. In truth, economic feasibility is part of technical feasibility. It is often possible to fit a round peg in a square hole if enough money is spent to make the round peg fit. In other words, a given change in manufacturing technique may be "technically infeasible" only as compared to some baseline of what it would cost to change the technique.

Rejecting that categorical distinction gave the court freedom to identify all instances in the agency's published explanation in which the agency referred to economic considerations.

EPA gave Sentelle quite a bit of ammunition. The essence of EPA's justification for permitting limited use of the disputed HCFCs was that widespread use of them in certain commercial applications with special "technical considerations" would "make it difficult for businesses to switch to other, non-ozone-depleting blowing agents." These considerations are all ultimately, according to Sentelle, economic:

- One such special technical consideration, according to EPA, arises in the case of foam used to insulate refrigerated truck bodies and insulated rail cars. In this case, industry requires not just the insulating and flammability control properties of the foam but also foam that permits industry to "maximiz[e] internal dimensions" of the shipping cars. The desire to maximize the internal dimensions "arises because trucking companies want to transport as much food as possible per truckload to maximize their revenues," wrote Sentelle.

- EPA also argued that "it had insufficient information to assess the 'viability'" of alternatives to the two HCFCs because their use is so widespread in such a large number of diverse end-uses that there would be many company-specific "technical considerations" warranting their continued use. In some such "niche applications," EPA argued, "foam manufacturers may experience difficulties and delays in transitioning to" a substitute. Sentelle untangled the argument and found economics at its core:

> The implication is that economic factors caused those companies to be "locked in" to using these particular chemicals in the manufacturing process, despite the fact that within those end uses, "non-ozone depleting alternatives have been identified and, in limited cases, implemented successfully." In other words, even though it is technically possible to use manufacturing techniques that do not deplete the ozone layer, it would cost too much to require companies to transition to such techniques given those that, for cost reasons, they have already implemented. This, too, is therefore an economic justification for continuing to allow these companies to use [the disputed HCFCs].

- EPA had also identified "technical constraints" specific to small businesses, stressing "the constraints associated with cost and timing of transitioning to alternatives for small businesses, and the need to facilitate a smooth and equitable transition." Sentelle found it easy to dismiss this argument:

> Finally, EPA noted that the wide variety of products these types of foam are used to manufacture meant that small businesses might economically suffer from a regulatory requirement to use non-ozone-depleting alternatives. EPA noted, specifically, that it was necessary to "level the playing field for small businesses," and that those businesses might face "constraints associated with cost and timing of transitioning to alternatives," a justification that clearly considers costs. Even if the agency is correct to characterize such concerns as "performance" or "technical" factors, the fact remains that they are also economic factors.

Although Randolph ultimately agreed that economic factors were considered in the rule, he took a slightly less direct route than Sentelle. Randolph opted to begin with the facial evidence of the rule itself and EPA's argument that the rule's plain language meant an end-user can turn to the two ozone-depleting HCFCs only "if it is not actually possible to use anything else." EPA's discussion of the *consequences* of its decision does not necessarily mean that it relied on such considerations in its actual decision:

> Expressing concern over whether a substitute product actually works (or works as well) as the substance it is replacing is, of course, a decision that may carry economic consequences, as where a less functional foam product will be less commercially desirable. If a foam is denser, picnic coolers will have to be heavier to keep the same amount of food cold; if a foam is less insular, it will require thicker walls in refrigerators or houses that use it as insulation. But that does not convert every decision EPA makes about whether a substitute works into a decision about costs ....

Randolph appears to be arguing that discussion of cost consequences must be differentiated from a rationale based on costs. Without making that distinction, argues Randolph, "[t]he court defines too broadly what it means for EPA to impermissibly consider costs."

Reading the agency record with a keener eye, Randolph honed in on the agency's emphasis on the "cost and timing of transitioning to alternatives for small businesses." This passage proved for Randolph to be the most important evidence of cost considerations:

> It is difficult to understand this passage unless EPA believes there is some subset of end-users for whom it would be possible yet very costly to switch to non-ozone-depleting alternatives, and that the rule grants this subset some form of relief. This, in turn, suggests that EPA construes the term "preclude" to mean something less than "make impossible," such as to "make difficult" or "make cumbersome."

Basis for Rejecting the Rule

Reaching the conclusion (albeit by different routes) that EPA did consider costs in its final rule, the court next addressed the impermissibility of that consideration. The answer from each opinion is that the consideration of costs required the court to reject the rule. The reasons supplied by Sentelle and Randolph differ significantly, primarily because Randolph's are actually coherent.

Sentelle's rationale for rejecting the rule appears to be that EPA must provide some reason for considering costs before actually considering them -- assuming, that is, that EPA can consider costs--and that EPA failed to justify its consideration of costs in the administrative record. The sequence of the argument must, however, be unscrambled from the paragraph in which it is confusingly written:

1. In accordance with the leading Supreme Court authority, the court must "defer to the agency's expert judgment" in interpreting Title VI of the Clean Air Act, "unless [the agency's] interpretation is unreasonable or if the plain terms of the statute say otherwise."

2. If EPA decides that Title VI of the Clean Air Act permits it to consider costs, then, this standard of deference will apply, and the court will be required to accept EPA's interpretation unless it is unreasonable or plainly divergent from the statute's language.

3. EPA does not actually argue that Title VI allows it to consider economic factors in determining whether an HCFC is acceptable as a substitute.

4. EPA does note that the relevant section of the statute prevents the substitution of harmful substances when the agency has designated an alternative that "reduces the overall risk to human health and the environment" and "is currently or potentially available." Clean Air Act § 612(c). EPA argues that the term "available" permits consideration of "economic or practicality" concerns.

5. EPA failed to state this argument in the administrative record but instead raised it for the first time in the court case.

6. "Such a justification cannot pass muster ... as the agency did not offer that construction of the statute below .... Therefore, even assuming, without deciding, that the text of section 612(c) permits EPA to interpret the statute to consider costs, we must still reverse EPA's decision and remand to the agency. Without knowing the agency's interpretation of the statute, we simply have no way of evaluating whether its interpretation is reasonable."

Randolph's alternative rationale for rejecting the rule is based instead on the agency's failure to follow its own regulations. Randolph notes that related regulations allow EPA to consider the "cost and availability of the substitute" as a factor in assessing the acceptability of a substitute. That regulation is strictly limited, however, to assessing whether EPA should *forbid* the use of the substitute. Because the consideration of the costs for small businesses to transition from the use of a prohibited HCFC is therefore precluded by the existing regulations, Randolph concluded, "it is arbitrary and capricious for EPA to fail to comply with its own regulations," and thus the disputed final rule should be remanded back to the agency for further consideration.

Like Sentelle, Randolph refrained from directly addressing whether Title VI of the Clean Air Act permitted cost considerations, although he did signal nonetheless that such considerations are most likely barred:

> Whether CAA § 612(c) would permit substantive consideration of transition costs is not apparent on the face of the statute and presents a serious question of statutory interpretation. Heretofore, when Congress has wanted the Administrator to consider costs under the CAA it has expressly called for consideration of costs or practicality. *See, e.g.*, 42 U.S.C. § 7411(a)(1), 7412(d)(2), 7479(2)(C)(3) .... The court has repeatedly held in cases involving other sections of the CAA that cost plays no role in the promulgation of emissions standards .... The Supreme Court's decision in *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 467-70, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), which rejected a reading of the term "public health" in the CAA that incorporated cost considerations, further cautions against reading economic considerations into the CAA where they do not appear on the face of the statute. Thus, whether CAA § 612(c) might permit consideration of practicality in extreme cases, such [as] where it would be so difficult to "fit a round peg in a square hole["] that a non-ozone-depleting alternative could no longer be said to be "available," is a question that is not yet before the court. EPA has not attempted to locate its approach in the statutory text, and it behooves the court, in light of the deference that may be due, to afford EPA the opportunity to decide whether transition costs are to be considered in evaluating a clean alternative's availability.

For Further Reading:

Decision in *Honeywell Int'l, Inc. v. EPA*, No. 02-1294, 2004 WL 1635626 (D.C. Cir. July 23, 2004)

Challenged rule:

- Proposed rule: 65 Fed. Reg. 42,653 (July 11, 2000)
- Final rule: 67 Fed. Reg. 47,703 (July 22, 2002)

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