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New Poll Finds Overwhelming Majorities Favor Government Regulation for Health and Safety

A new Harris poll conducted for Advocates for Highway and Auto Safety reveals that nine out of ten Americans believe that governmental regulation to protect health and safety is important.

The finding accords with similar findings since 1996.

According to the study's authors, "the weight of public opinion is overwhelmingly on the side of having federal responsibility for . . . safety and public health. The intensity of support is also high." Of those who rated the government's role as important, almost 64% (or 58% of all respondents) considered the government's role as very important.

"Over the years, roughly six in 10 Americans have viewed government regulatory responsibility over highway and auto safety and other matters affecting the health and safety of the people as not just important, but 'very important,' essentially indicating that they view it as an indispensable *necessity*," the report continued.

More specifically, the poll found widespread support of governmental regulation to make auto safety standards

tougher and more uniform. Among the findings:

- Making all vehicles, including sport utility vehicles, more stable and less prone to roll over is favored by 84% of the American public, including 8 out of 10 SUV owners.
- An overwhelming majority -- 9 out of 10 surveyed -- wants the government to set auto safety standards.
- More than 90% of adults surveyed said they would be willing to spend $200 to $300 more for safety improvements in new cars.
- Another majority, 83%, wants the government to "require a major upgrading of roof safety standards" to prevent the roof of a car from crushing inward during a rollover.

These findings come at a critical time, as the Senate and House are conferring on the Safe, Accountable, Flexible, and Efficient Transportation Equity Act (SAFETEA), a transportation bill for which the Senate version, but not the House version, would require safety improvements addressing many of the concerns identified by the poll.

Appropriations in November?

The House has been steadily moving forward with appropriations bills, in spite of the tight cap on appropriations spending for 2004; but in the Senate only one bill -- Defense -- has passed, and only one other bill -- Homeland Security -- has even gotten through a full Senate committee. None has made it to the Senate floor.

Little time remains in this pre-election congressional session -- only 14 days in July and only 19 days in September. The new fiscal year of 2005 begins October 1, 2004. What seems to be the problem?

- Last week Senate Appropriations Chairman Ted Stevens (R-AK) cancelled nine subcommittee markups. According to a *Congressional Quarterly* report, the purpose was to keep the markups from being available for public scrutiny over the summer break. Given the tight budget cap necessitating cuts or, at most, level funding of a number of programs and services, advocates would be able to highlight and garner public support against cuts in widely supported programs. Politically unpopular cuts, like inadequate funding of healthcare for veterans while fighting continues in Iraq and Afghanistan, could become political issues.
- Before proceeding with appropriations, Senate Majority Leader Bill Frist (R-TN) is determined to get agreements with Democrats limiting the time for floor debate of appropriations bills. The time limits would protect these from the addition of numerous amendments, including those with political overtones.
- Senate leadership may, all along, have been anticipating wrapping all the appropriations bills into an omnibus bill, rather than debating each bill (and allowing the cuts to be more publicly known).
- Meanwhile, with so many important matters facing Congress this week, lawmakers are set to squander considerable time debating and voting on the completely symbolic proposed constitutional ban on gay marriage, which nearly everyone agrees cannot pass. The sole purpose is to build some members' political currency with constituents over the July/August break.

There had been talk of the Senate wrapping the remaining ten appropriations bills into an omnibus bill and attaching it to the Homeland Security appropriations bill for passage before the July/August break. Now it seems less likely that Homeland Security will move before the summer break, in spite of some mutterings about the failure to pass Homeland Security, given the recent warnings about terrorist threats this summer. Homeland Security will remain a possible vehicle to carry the omnibus bill come September.

What does all this boil down to? It's an election year, so election posturing takes precedence over getting the substantive work of funding the government done. In the same vein, the majority has continued to use strong-arm tactics, as during the extended debate about amending the Patriot Act last week, which have even further divided Congress. This makes it difficult for Congress to work cooperatively on much of anything.

Finally, lawmakers have a number of amendments they would like to see attached to some bill and there is a very short time with few opportunities to do so. These include amendments to block the Department of Labor overtime rules, increase the minimum wage (Sen. Kennedy tried but failed to attach an amendment to the class action bill raising the minimum wage from $5.15 to $7.00), reduce greenhouse gasses, legalize the re-importation of drugs from outside the US, and extend the ban on assault weapons. Congress also still must pass an increase in the statutory debt limit. The majority would prefer to do so as an amendment buried in another bill, rather than make an issue of it. (Republican leaders tried to get the debt limit increase into the Defense

appropriations bills, but failed).

Probably only the Defense appropriation, which is almost ready to be sent for the President's signature, will become law before the July/August break. It may also be the only one of the 13 appropriations bills to be considered alone. It now seems that the real appropriations work will be delayed until after Congress returns -- or maybe even until after the elections, with continuing resolutions instead funding government through a "lame duck" session of Congress.

Estate Tax Update

The status of the estate tax repeal has not changed, but action is likely before this congressional session ends.

The $1.3 trillion tax cut package passed in June 2001 bill included a one-year repeal of the estate tax effective in 2010, with gradually increasing exemption levels and decreasing tax percentage rates until then. In 2011, the estate tax will revert back to the law that was in effect in 2001.

Permanent repeal of the estate tax is something of a conservative fixation, making it likely that efforts will be made to accelerate the repeal, to extend the repeal, to make the repeal permanent, or possibly to "reform" the estate tax by making the exemption levels so high and the tax rate so low as to render it repealed in all but name. However, the failure of Congress to pass a budget resolution; the tight budget situation and the cost of repeal; and the expiration in 2004 of the so-called "middle-class" tax cuts, all mitigate against the possibility of estate tax repeal anytime soon.

It is unclear how the deadlock over the estate tax will be broken -- especially in the near future. There appears to be broad congressional support for extending the so-called "middle-class" tax cuts that are due to expire in 2004, in spite of the rising deficits. However, even those tax cuts may require offsets since the proposed PayGo rules that would have exempted tax cuts from the offset requirement have been defeated so far. The failure of Congress to pass a budget resolution means that there are no reconciled funds available for any tax cuts during 2004, including repeal of the estate tax.

Future plans are uncertain, but there likely will be one more vote in the Senate on a measure to repeal or reform (in a manner not yet determined) the estate tax, essentially to send a message to voters before the election. For more information and updates see the Americans for a Fair Estate Tax coalition website.

United for a Fair Economy has launched a campaign to have business owners sign on to a statement in support of the estate tax. UFE would welcome efforts to increase the number of signers.

Tax Cut Extensions Possible

We reported earlier that Senate Finance Committee Chairman Charles Grassley (R-IA) wanted to delay until September consideration of extending the "middle-class" tax cuts -- marriage penalty, expansion of the 10% income tax bracket, and the $1000 child tax credit -- that will expire on December 31. However, the Bureau of National Affairs (BNA) reported July 12 that House and Senate leaders plan to consider the cuts late this week.

Grassley reasoned that the same Senators, who so strongly fought against a budget resolution requiring offsets on entitlements, but not on tax cuts, may insist that the costs of extending any tax cuts should be offset to avoid worsening the deficit. However, after both parties' conventions are over in September, and as the December 31 deadline gets closer, that insistence might fade.

The House has already passed bills making permanent the three middle-class tax cuts and extending the Alternative Minimum Tax (AMT) breaks for one more year. Those bills have no offset provisions. President Bush, of course, strongly supports extension of all the tax cuts and prefers earlier passage.

BNA also reported this morning that House and Senate Majority leaders are trying to write a conference report on the House-passed child tax credit refund bill (H.R. 1308), and use it as the vehicle for extension of at least those three expiring tax cuts. It is not known whether the AMT (or other tax cuts) will be part of that package, especially since fixing the AMT is very expensive compared to the cost of extensions of the other tax cuts. With apparent reluctance, Grassley has agreed to earlier consideration, although high support for the extension of the three tax cuts in the Senate is mixed with concerns about increasing the deficit.

OMB Watch Uncovers Flaws in OMB's Data Quality Report

The Office of Management and Budget (OMB) recently published a report to Congress that analyzes and summarizes federal agencies' first year of operations experience using the new information quality guidelines mandated under the Information Quality Act (IQA). The guidelines are supposed to ensure the quality, objectivity, utility, and integrity of information disseminated by federal agencies. The report provides OMB's perspective on the first year under the law and the IQA reports submitted to OMB from individual agencies. Unfortunately, OMB Watch's analysis found that OMB's insights are biased and its facts inaccurate.

OMB's report is seriously flawed: data is inaccurate, information is misleading, and overall the report is highly biased. For example:

- OMB claims that agencies only received 35 information quality challenges in Fiscal Year 2003. Yet, even using questionable methodology employed by OMB, the number is 98, nearly triple the number in the report.
- OMB states that "most" IQA challenges that were denied were appealed and that the appeals process "appears to have fostered corrections." Yet only 28 percent of denied challenges were appealed -- clearly not "most." And of these appeals, only 5 resulted in partial or full corrections -- and 4 of these were for what is called non-influential information.
- OMB accurately states that a wide range of stakeholders have filed information quality challenges, dismissing fears that these challenges would be dominated by industry. But OMB fails to disclose that 72 percent of the challenges -- nearly three-quarters -- were from industry.
- OMB claims that the IQA has not slowed down agency rulemakings or dissemination activities. Yet OMB has no data to draw such conclusions. OMB did not collect information from the agencies about impact on rulemakings or dissemination. Instead, OMB relies on conjecture or highly flawed logic to make its point (See links to both the full analysis and the OMB report below).

The template OMB created for the first year reports from agencies does not collect the type of information that would allow for a thorough assessment of the new law. For example, OMB does not ask agencies to send information on the amount of resources each devotes to IQA activities or the impact the IQA has on other agency activities such as rulemakings and dissemination of information. Congress must have such information in order to evaluate the implementation of the law accurately.

The OMB report to Congress has so many problems, it probably would not meet the standards established under OMB's own information quality guidelines. There are problems with reproducibility, transparency of the methodology, accuracy of the data, and general reliability -- all key factors under the information quality guidelines.

Regardless of the merits of OMB's report to Congress, it is clear that this law has had a significant impact on government operations, and surprising that Congress has never had a hearing -- not even during development. In light of the OMB report, congressional oversight is now needed, including a General Accounting Office assessment of the law's implementation, and hearings on whether the law needs to be modified.

OMB Watch's full analysis of OMB's report
OMB's DQA Year-1 report to Congress

Scientists Speak Out Against the Bush Administration

Last week the Union of Concerned Scientists (UCS) released updated evidence that the Bush administration continues to manipulate and control science for political reasons. UCS has now collected the signatures of more than 4,000 scientists supporting a statement urging the Bush administration to discontinue these troubling practices, and to restore scientific integrity in federal policymaking. The prestigious list of scientists taking this unprecedented stand includes 48 Nobel laureates, 62 national medal of science recipients, and 127 members of the National Academy of Sciences.

UCS released a report in February detailing numerous cases of manipulation, distortion, and suppression of scientific information within government agencies. The White House dismissed the concerns raised in the report

and has continued operating as before. UCS blames this denial for the significant increase of interest in the scientific community.

The new cases involve issues ranging from mountaintop removal strip mining to endangered species. The evidence also exposes significant political interference with independent scientific advisory panels, most notably at the National Institutes of Health (NIH), under the Department of Health and Human Services.

UCS outlines measures that could mitigate the problems and begin to correct the situation, including:

- Whistleblower protection of government scientists;
- Restoring independent scientific advice to Congress, possibly within GAO;
- Greater oversight powers for the Office of Science and Technology Policy;
- Stricter enforcement of the Federal Advisory Committee Act (FACA) with increased transparency for selection and activities of advisory committees; and
- Full access to government scientific analysis that isn't legitimately classified for national security reasons.

Patriot Act Intact but Under Fire in Congress

In a vote reflecting disagreement among Republican leaders and several conservative members of Congress over the USA Patriot Act, the House of Representatives defeated by the thinnest possible margin an effort to reign in the government's power to require libraries and booksellers to reveal the books people are reading.

Libraries and booksellers, including the American Library Association and American Booksellers Foundation for Free Expression, have gathered over 100,000 signatures in a campaign to support the Freedom to Read Protection Act, yet the House deadlocked on the bill.

The limits on the Patriot Act appeared to pass, but House leaders extended the voting deadline and convinced enough members to switch their votes to deadlock the chamber into a 210-210 tie, enough to kill the measure. The White House had earlier threatened a veto. It was not easy for Republican leaders to defeat the measure and prevent changes to the Patriot Act, which has been severely criticized ever since its hasty passage in the hazy weeks after 9/11.

Groups Object to Indian Affairs FOIA Exemptions

Several groups and individuals voiced objections to a Senate Bureau of Indian Affairs reform bill, in a letter delivered to Senators Ben Nighthorse Campbell (R-CO) and Daniel K. Inouye (D-HI) July 8.

The groups oppose Section 7 of S. 297, the Federal Acknowledgment Process Reform Act of 2003, which would exempt from the Freedom of Information Act (FOIA) certain actions by the Interior Department's Assistant Secretary for Indian Affairs. The exemption would specifically allow Interior to hide its actions on any Indian group's petitions for acknowledgment, until the petition has been "fully documented" and the assistant secretary publishes a notice of its receipt in the Federal Register. This exemption would not apply to U.S. law enforcement formal or informal requests, or subpoenas.

The bill asserts that Section 7 aims "to increase the transparency, consistency, and integrity of the [tribal] acknowledgment process." The letter argues that this approach is fundamentally flawed and actually "makes the acknowledgment process more obscure." Instead, the groups believe that using online dockets to display the information, as mandated by E-FOIA, would generate greater efficiency and cost-savings.

The signatories on the letter include journalists and federal and state organizations.

Poll Shows Growing Public Support for First Amendment

Public support for the First Amendment has rebounded to pre-9/11 levels, according to this year's results of an annual poll by the First Amendment Center.

Two findings from the survey, released in conjunction with the nation's Fourth-of-July celebrations, are noteworthy for advocates of open government. The poll shows nearly two-thirds of Americans disagree with the statement that the First amendment goes too far in protecting freedoms. Last year Americans were evenly split on the statement. Second, a growing number of Americans say they want more and better information about the United State's efforts to combat terrorism: 50 percent in 2004, up from 40 percent a year earlier.

The survey is available from the First Amendment Center.

Ad Council pushes public to "exercise freedom" after 9/11

The Advertising Council last week released several public service announcements designed to remind Americans to support and defend freedom as part of the response to the attacks of September 11. These new ads encourage Americans to exercise their freedom by voting, volunteering and otherwise engaging in civic life.

The spots stress that most Americans care about social problems but do little or nothing to address them. One spot shows person-on-the-street interviews in which individuals identify problems they consider important, such as education, racism and women's rights. When asked what they personally are doing about these, the individuals are stumped. The ad ends with the message, "Keep freedom strong. Exercise it." (To view this and other ads in the campaign, go to www.explorefreedomusa.org/hear/index.html. This ad is entitled, "Ummm.")

The Ad Council is making these ads freely available for nonprofits and others to highlight on websites. The spots are designed to air through the Internet as well as on television, in newspapers, and on the radio.

The new series of advertisements push Americans to find out more at a new website, www.explorefreedomusa.org. The ads are part of the Ad Council's Campaign for Freedom, created in response to the events of September 11, by a leading advertising agency working with college students at Virginia Commonwealth University. The Council convened academics, entertainment executives and public interest advocates to help inform its strategy. Previous ads are available at www.rememberfreedom.org.

Legality of Campaign Coordination with Nonprofits Questioned

Two presidential campaigns are facing challenges about their ties to nonprofit groups. The Bush campaign's appeals to churchgoers to recruit from their congregations, and the Ralph Nader campaign's office rental agreement with a 501(c)(3) group founded by him, both raise the possibility that charitable or religious resources are being used for partisan purposes. Both are the subject of a complaint filed at the Federal Election Commission (FEC) that alleges illegal coordination between the campaigns and two nonprofits in Oregon working to get Nader on the state ballot.

FEC Complaint Against Bush, Nader Campaigns, and Two Nonprofits

On June 30 Citizens for Responsibility and Ethics in Washington (CREW), a nonprofit that "focuses on government officials, who sacrifice the common good to special interests" through litigation, filed an FEC complaint alleging illegal coordination between two Oregon nonprofits, the state's Republican Party, the Bush campaign and the Nader campaign. CREW also alleges the nonprofits, Citizens for a Sound Economy and the Oregon Family Council, made prohibited corporate contributions to the Nader campaign.

The primary issue is whether the parties violated FEC regulations defining prohibited coordination between campaigns and outside groups. CSE and OFC operated a phone bank urging conservatives to sign petitions to put Ralph Nader on the presidential ballot in Oregon, saying "If Ralph Nader gets on the ballot he would pull thousands of liberal votes that would otherwise go to Kerry and perhaps cause President Bush to win the election." CREW says the effort was coordinated with the state Republican Party and Bush-Cheney campaign and

used their resources.

CSE's press release responding to the charge said there was no illegal contribution because the group did not expressly advocate election or defeat of a federal candidate. CSE is a 501(c)(4) organization that can be involved in partisan electioneering, but support for federal candidates must be paid for from a separate segregated fund. Their statement did not address whether the funds used came from such a fund. The complaint says the Oregon Family Council is also a 501(c)(4) organization.

More recently the Detroit Free Press reported that the state Republican Party is collecting signatures to put Nader on the Michigan ballot.

Recruiting Church Members

The Bush-Cheney re-election campaign is targeting religious voters by asking church members to recruit volunteers from the ranks of their congregations and post campaign information in church facilities. A recent action plan sent to volunteers lists 22 "duties" to be carried out over the summer. For example, by July 31 volunteers are asked to "send your Church Directory to your State Bush-Cheney '04 Headquarters or give to a Bush-Cheney Field Rep.," and "Talk to your Pastor about holding Citizenship Sunday for Voter Registration Drives." By August 15, they are to "talk to your Church's seniors and 20-30 something group about Bush-Cheney '04 and recruit 5 or more people in your church to volunteer for the campaign."

The *Washington Post* obtained a copy of the packet and reported that it does not contain any information warning volunteers not to endanger their church's tax-exempt status by involving it in partisan activities. (Religious organizations, like all groups exempt under Section 501(c)(3) of the tax code, are prohibited from supporting or opposing candidates, but are allowed to engage in nonpartisan voter education and mobilization activity.) The IRS said it would not comment on the issue, since limited facts are available. However, last month the IRS wrote a letter to national political parties warning against involving 501(c)(3) organizations in campaigns after the Bush campaign sent emails asking volunteers to identify "Friendly Congregations" for the campaign.

The Bush campaign's efforts have been criticized by the conservative Southern Baptist Convention, which objected to using religious groups for political purposes, and the liberal Americans United for Separation of Church and State, which called it a misuse and abuse of churches for partisan ends.

Nader Campaign Office Rental Deal Subject of FEC Complaint

CREW has also filed complaints at the FEC and Internal Revenue Service (IRS) against the Nader campaign, saying the campaign is receiving discounted office space and telephone service from a 501(c)(3) organization, Citizen Works, which Nader had founded in 2001. In June, the *Washington Post* reported that FEC records show rental payments from the campaign to Citizen Works. A common receptionist works for both groups, as well as other sub-tenants. Citizen Works' president, Theresa Amato, is Nader's campaign manager. If the rent is found to be below market rate, or if other services are provided at a discount, Citizen Works will have made an illegal in-kind contribution to the Nader campaign and endangered its tax-exempt status. To date no action has been taken by the FEC or IRS.

More Evidence of Misconduct by Head Start Bureau Chief

On June 30, the National Head Start Association issued a statement calling for the immediate resignation of Windy Hill, the U.S. Head Start Bureau Chief. Hill is the subject of an Inspector General investigation into misconduct during her tenure as head of a Texas Head Start agency prior to coming to Washington. The investigation began after NHSA released details of Hill's misconduct in April, alleging thousands of dollars in unauthorized pay, vacation time and undocumented expenses. Hill has announced her resignation effective in November, but NHSA released new details of misconduct and said the resignation should be effective immediately.

Last year Hill sent letters to Head Start grantees that contained confusing and inaccurate information about grantees' right to lobby on Head Start issues. The letter threatened sanctions against programs and parents who engaged in lobbying activity. After NHSA filed a lawsuit, HHS was forced to send a corrected letter to all Head Start programs.

In addition to its previous allegations, NHSA's new announcement said Hill hired the suspended Texas accountant that reviewed her programs as a HHS reviewer of Head Start programs. The group also alleged that Hill began her job at HHS while on "leave of absence" from the Texas program, without disclosing that fact to her board or in the Public Financial Disclosure Report required by ethics laws.

Court Says State Must Accept Voter Registrations From Nonprofit Project

A Georgia education group involved in a multi-state effort to register voters won a preliminary injunction in early July barring the Georgia Secretary of State from rejecting voter registration cards mailed in bundles. The case, Charles H. Wesley Education Foundation, Inc. v. Cathy Cox, et al., was a test of whether state officials can impose rules on voter registration drives that are inconsistent with the National Voter Registration Act (NVRA).

The public charity was participating in a voter registration drive with the National Coalition on Black Civic Participation, Alpha Phi Alpha fraternity and the National Pan-Hellenic Council. Cathy Cox, Georgia's Secretary of State, rejected 64 voter registration applications mailed by the project because they did not comply with Georgia procedures. This process requires each card to be individually mailed to protect privacy and requires voter registration projects to register in Georgia on a county-by-county basis.

U.S. District Court Judge William C. O'Kelley issued the preliminary injunction against the state, holding, "Because the applications were received in accordance with the mandates of the NVRA, the State of Georgia was not free to reject them." The court will be ruling on a permanent injunction after further proceedings.

For more information on nonprofits helping voters to register and vote, see www.npaction.org/helpUSvote.

IRS Suspends Tax-Exempt Status of Group on Terrorist List

The Internal Revenue Service (IRS) released Announcement 2004-56 on June 24, suspending the tax-exempt status of the Rabbi Meir Kahane Memorial Fund (the fund), which is a part of the Kahane movement. The action was based Section 501(p), a new section of the tax code created in 2003 as part of the Military Family Tax Relief Act.

Section 501(p) suspends tax-exempt status for any group designated as a terrorist group under the Immigration and Nationality Act or by Executive Order. Donations to such a group are not tax-deductible. The law denies any appeal or challenge to the suspension, but allows the Executive Branch to restore exempt-status in the case of erroneous designation. However, there is no process for review or reinstatement in the law.

Kahane-related groups were designated by the State Department as terrorist organizations in December of 2000. Kahane groups, including the fund, work to legalize the views of the Israeli politician, Rabbi Meir Kahane, who believed that Israel is the motherland of the Jews and all hostile Arabs must be removed. Kahane was assassinated in 1990. The group posted its response on its website

In September 2003 OMB Watch published a report, Patriot Games: The Patriot Act and its Impact on Nonprofits, which raises concerns about the broad powers to shut down organizations and the lack of due process involved.

Senate Finance Committee to Hold Roundtable on Nonprofit Issues

The Senate Finance Committee recently announced it will hold a roundtable discussion Thursday, July 22, on issues concerning exempt organizations. The two main purposes of the roundtable are to follow-up on the committee's hearing on charities, and to further review the staff's discussion draft regarding proposed reforms to exempt organizations.

On June 22, the committee held a hearing on charitable governance reform. Witnesses addressed a wide range of issues on governance, accountability and enforcement of tax laws. On that same day, the committee's staff released its draft discussion paper with proposals for reform in governance, conflicts of interest, grant-making, federal-state coordination, reporting and disclosure, boards of director responsibilities, best practices and funding for enforcement.

Now the Senate Finance Committee is extending the opportunity to comment to nonprofit organizations nation-wide. The committee chairman recognizes the expertise in the tax-exempt field and would like the field's

viewpoints to be heard. If you are interested in providing the committee with comments, please take time to review the staff's draft discussion paper on proposed reforms to exempt organizations. You can also read OMB Watch's summary of the draft.

Submit your comments to the Finance Committee by the close of business on Friday, July 16. Written submissions can be sent by email to the Finance Committee at charities@finance-rep.senate.gov. Those who submit comments may also request to attend.

It is extremely important that the Senate Finance Committee hear the viewpoints of state and local nonprofits. Read Senate Finance Committee Holds Hearing on Nonprofits for more background information on the hearing. If you have additional questions, please call (202) 234-8494 and ask for Kay Guinane or Abbey Tyrna.

AmeriCorps Programs Violate Separation of Church and State

On July 6, a federal court judge ruled that AmeriCorps must stop funding programs that place volunteers in Catholic schools.

The American Jewish Congress (AJC) brought suit against the Corporation for National and Community Service (CNCS), the federal agency that runs AmeriCorps, for unconstitutionally crossing the line between church and state. AJC claims that because AmeriCorps volunteers are sponsored with federal dollars through "educational awards," that they should not be placed in religious institutions such as Catholic schools. Some AmeriCorps programs send volunteers to work in religious schools where they teach religion to students throughout the school day, lead their students in prayer multiple times a day, and attend mass with their students.

The University of Notre Dame intervened on behalf of CNCS. Notre Dame and CNCS argued that AmeriCorps was not violating the Establishment Clause of the First Amendment (the part of the First Amendment that calls for the separation of church and state) because volunteers would essentially "clock out" during times of religious instruction. Defending the process CNCS stated that the time volunteers spend engaging in religious activity is not recorded on timesheets that are submitted to justify the educational award.

However, Judge Gladys Kessler of the U.S. District Court of District of Columbia ruled that time sheets used to prove that volunteers were not getting paid for their time while being involved in religious activity were "totally inadequate." Kessler writes, "Moreover, even if the court assumes the Corporation [for National and Community Service] accurately estimates the time AmeriCorps participants spends on religious versus non-religious activities, it is impossible to distinguish between the two roles that AmeriCorps participants supposedly play. The line between the two has become completely blurred."

The case could definitely have broader implications on President Bush's faith-based initiative. Although Bush's initiative has not been able to pass through Congress, it has been implemented administratively through Executive Order. Federal grant-making agencies have created new rules that make it easier for government to contract with religious organizations for social services. While religious organizations that receive federal funds are encouraged to maintain their religious identity and character, they are barred from using federal money for religious activity. New agency rules state that religious activity must be carried out during a separate time or location from those activities that are supported with federal funds. Could the line between the two also become completely blurred?

Read Kessler's full opinion.

SBA Proposes, Withdraws Proposal to Change Definition of 'Small Business'

Last week the Small Business Administration retracted its proposal to alter a powerful federal designation that affects the work of almost every federal agency. Only "small businesses," designated as such by SBA, are eligible for SBA loans and roughly a fifth of federal procurement contracts. But SBA's "size standards" also grant to small business privileges to challenge agency regulations both in rulemaking and rule enforcement periods. Defenders of agency effectiveness have more at stake in the debate over the definition of small business than is immediately apparent.

SBA is charged with providing loans and other advantages to small businesses within each industry. But deciding

which businesses are small can be complicated. Because a "small" oil company is much larger than a "small" barbershop, SBA must establish the definition of a small business within each separate industry. For over 600 industries, the number of employees a business has determines its size classification. Revenue- (or receipt-) based size standards are employed for almost 500 other industries. SBA limits itself to 30 possible receipt-based size caps (ranging from $750,000 to as high as $48.5 million), five employee-based size standards (ranging from 100 to 1500 employees), and two standards based on other measures. Apparently, limiting to 37 the total set of options for choosing a receipt or employee cap in each industry simplifies things: SBA need not tinker with the exact number of employees that differentiates a small business from a large one, but it need only make adjustments when an industry has changed significantly.

Presumably, SBA uses receipt-based standards in the belief that receipts are a better reflection of market share than employee counts in some industries. However, in an attempt to abandon years of using the more traditional receipt-based standards, the proposed rule would have applied an employee-based size standard to all industries, eliminated revenue-based standards entirely, and reduced the number of size standard levels from 37 to 10. According to the SBA, roughly 34,000 businesses would have lost "small business" status, while approximately 35,000 would have gained it.

In its March 19 proposal, SBA claimed that the current structure is too complicated, despite its having "worked well" for many years, and that businesses seeking government contracts have too hard a time figuring out what size standard applies to them. Particularly, businesses that operate in multiple industries might encounter both receipt- and employee-based size standards in order to apply for one contract.

After commenters displayed a "significant level of interest" in the proposed change, SBA extended the comment period from May 18 to July 2 and received over 3,700 comments, most in opposition to the proposal. While many commenters agreed that simplification is a good idea, some, like the Contract Services Association, denied that any problem exists at all, arguing that finding the applicable size standard is simply a matter of reading a table. Senator John Kerry suggested in his public comments that businesses are intimidated or confused not by SBA size standards but by "burdensome paperwork and reporting requirements . . . and an unlevel playing field in the competition between small businesses and firms that are other than small."

The strongest criticisms came from businesses expected to lose "small business" status and their advocates. The American Bar Association argued that it is unfair to ruin thousands of businesses that were formed and structured in good faith as small businesses solely to meet government contracting needs. Many have suggested such businesses should be grandfathered into status. Senator Kerry also wrote, arguing that the proposal might result in substantial job loss during tough economic times.

But while Kerry has argued for providing more access to loans and government procurement contracts for small business, his arguments did not accommodate other public interest concerns about aspects of the definition of small business. Those interested in curbing the influence of business on federal agencies see the small business tag as a backdoor method of slowing the regulatory process.

Because of three important federal statutes, rulemaking is more burdensome when the proposed rule has a significant economic impact on small business. When the economic impact is significant, agencies must justify the rejection of less economically affecting alternatives. OSHA and EPA are further required to consult with a panel of small business representatives.

Agencies face even more significant obstacles when enforcing rules against small business. After an agency has issued a citation for violating a rule, small business owners may petition agencies to reduce or waive penalties on the basis of their economic impact to the business (as long as the violations are neither criminal nor "pose serious health, safety, or environmental threats") or may file a grievance in court against an agency if it feels "adversely affected or aggrieved" by a ruling. The court, in turn, may suspend regulations and force revisions that are conducive to small business interests or establish that certain regulations cannot be enforced against any small entity. Small businesses may also bring a civil action for attorney's fees whenever a citation is found to be unreasonable or excessive.

These wide protections already cover some very large businesses. In fact, 97 percent of all American businesses fit into the SBA definition of "small business." Well over half the industries in the country are covered by either the 500 employee-based size standard or a $6 million receipt-based standard. A contractor making up to $17 million a year, a chemical company with as many as 1,000 employees, and a petroleum refinery with no higher than 1,500 employees are all considered "small business" by SBA.

In addition, "small businesses" may be responsible for significant harm to the public interest. As noted by a recent AFL-CIO fact sheet, establishments with fewer than 100 employees -- all of which are considered "small businesses" -- maintain higher rates of fatal occupational injury than do businesses with 100 or more employees.

Making matters worse, the proposed change in SBA's definition could very well have resulted in more and larger businesses gaining small business status. While only 1,000 businesses would have immediately gained the "small business" classification according to SBA estimates, many more could have used the employee-based standards to gain the designation by outsourcing employees. Outsourced and subcontracted employees are not counted toward employee-based size standards. Thus, the SBA proposal could have encouraged the practice of outsourcing or subcontracting for businesses seeking to win or maintain "small business" status.

Outsourcing has become an increasingly important -- and controversial -- business practice over the last few years. In a recent cover story, *Time Magazine* listed 11 percent of American jobs at risk of outsourcing, including telephone call center employees, computer operators, data enterers, business and financial support, paralegals and legal assistants, diagnostic support service staff, accounting, bookkeeping, and payroll staff. Some NAICS industry sector categories that are currently covered by receipt-based standards and may be particularly vulnerable to outsourcing are Data Processing Services; Financial Investments; Funds, Trusts, and Other Financial Vehicles; Professional, Scientific and Technical Services; Administrative and Support; and Waste Management and Remediation Services. Noteworthy industry subsectors include Offices of Lawyers, Marketing Research and Public Opinion Polling, Translation and Interpretation Services, Document Preparation Services, and Travel Agencies.

It is unclear how much larger the incentive would have been for businesses to outsource in order to maintain or achieve small status. But the industries most affected by outsourcing are the ones currently using receipt-based size standards. So whether "small business" protections provide greater incentive for businesses to outsource, businesses, which already outsource would have been more likely to gain small business status. As SBA continues to consider moving away from receipt-based standards, the backdoor widens, and obstacles to agency functioning are increased.

On a broader note, it is questionable that SBA would propose to eliminate receipt-based standards and decrease the number of size standard levels in the first place. One of SBA's original missions was to protect competition and market access for smaller businesses. Receipts have traditionally been a critical tool in determining the market share or market dominance of businesses, presumably in industries where there is little correlation between employees and market share. Multiple size standard levels have been in keeping with the intent of the Small Business Act, which states, "the Administrator shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various institutions." As Kerry puts it: "The variety of goods and services being provided to the government has increased not declined." Moreover, the diversity of American industry has grown not shrunk.

It is no longer clear how much effect government loans and contracts might have on the competition in a particular industry. But, in the current state of affairs, where the vast majority of businesses in the nation are considered small -- indeed, entire industries are considered "small" -- and industry hostility to public welfare regulation has been echoed in the highest levels of this administration, it should come as no surprise that SBA proposed to increase rather than decrease the number of high-income businesses considered "small."

SBA Lobbies States for Small Business Role in Regulation

The Small Business Administration (SBA) has been actively lobbying the states to enact legislation that would increase the role of small business in state regulatory processes, promoting in particular a model bill that would force state agencies to review the costs to small business of proposed public safeguards and, ultimately, all existing state regulations.

Since January 2003, personnel from SBA's Office of Advocacy has testified at least eight times to state legislatures urging passage of the model bill or other legislation that would give small business a seat at the regulatory table (without providing any similar opportunity for citizen or public interest involvement). It has also ensured wide circulation of the model bill by releasing it through the American Legislative Exchange Council, a network for conservative state legislators.

It is not clear what legal authority allows the federal SBA to lobby state legislatures.

The SBA crafted its model state bill on the federal Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act, which force federal agencies to analyze proposed rules for their costs to small businesses, consider alternatives that would cost less for small businesses, and explain their reasons for rejecting such alternatives.

States adopting such legislation will now be forced to address the same issues that small business considerations raise in the federal rulemaking process. The very definition of what constitutes a small business, for example, can be so easily manipulated that it could stretch far beyond the sentimental image of the mom-and-pop storefront to include all but the tiniest fraction of total industry. Moreover, the public welfare problems tackled by regulations do not necessarily accommodate the special needs of small businesses. Asthmatics troubled by air pollution will find it difficult to breathe polluted air whether a small or large business is responsible for the emission, just as an employee crippled by unsafe working conditions is crippled all the same whether the business itself is large or small.

Enforcement Report: A round up of news items related to agency enforcement activity & gaps

As reported in the recent Citizens for Sensible Safeguards report *Special Interest Takeover*, one of the many threats to our regulatory system is the lack of enforcement of existing regulation. In recent years, the budgets for agency enforcement efforts have been slashed and personnel have been cut. The EPA's Office of Enforcement and Compliance Assurance, for example, has seen a reduction in staff of 12 percent, bringing its staff numbers to the lowest levels since the formation of the agency. The resulting lack of enforcement of existing safeguards threatens the public health, safety, and environment. The following is a roundup of recent examples of inadequate enforcement of public safeguards.

USDA Ignores Canadian Beef Regulations

As has been widely reported in the media, last fall the USDA allowed 7.3 million pounds of Canadian processed beef into the United States in violation of a trade ban enacted after some Canadian cows were found to have been infected with "mad cow" disease. When the USDA allowed the Canadian beef to enter the United States, it disregarded two food safety standards: one "that brain and spinal tissue of US-bound Canadian beef be removed before shipping to the United States, and another stipulating that the beef must be processed in facilities that are used only for the slaughter of animals eligible for export to the United States," according to the BNA. In issuing permits for Canadian beef, the USDA risked contaminating US beef supplies, putting American consumers at risk. Now the agriculture department's Inspector General, Phyllis K. Wong, will investigate the USDA's actions at the request of Senators Thomas Daschle (D-SD), Tom Harkin (D-IA), and Mark Dayton (D-MN).

EPA's Lack of Enforcement Leads to Increased Refinery Emissions

According to a report released by the EPA's Office of Inspector General(IG), the EPA's Office of Enforcement and Compliance Assurance (OECA) "has not established and communicated clear goals, systematically monitored refinery program progress, reported actual outcomes, or tracked progress toward achievement of" the goals of its settlement agreements with petroleum refineries that pollute.

Petroleum refineries became a national priority for the OECA in 1996, when it was discovered that refineries "had the highest inspection-to-enforcement ratio of the 29 industry sectors ranked by EPA," the report said. According to the report,

> The 145 operating petroleum refineries in the United States span 9 of EPA's 10 regions and 33 States. Petroleum refineries account for significant releases of pollution into the environment. In 2001, refineries released over 35,000 tons of toxic air pollutants, with 75 percent released to the air, 24 percent to the water, and 1 percent to the land. These pollutants seriously affect human health and the environment, and they include pollutants known or suspected to cause cancer or other serious human health effects.

The current compliance strategy for refineries was developed and implemented by EPA in conjunction with the U. S. Department of Justice. The integrated strategy, with tactics ranging from compliance assistance to inspection and enforcement, has been implemented over the last 8 years and has evolved to meet specific compliance problems. As of this March, the IG reported, refineries have agreed "to invest more than $1.9 billion in pollution control technologies, pay civil penalties of $36.8 million, and implement supplemental environmental projects valued at approximately $25 million." EPA projects a significant reduction of pollutants as a result of the compliance program.

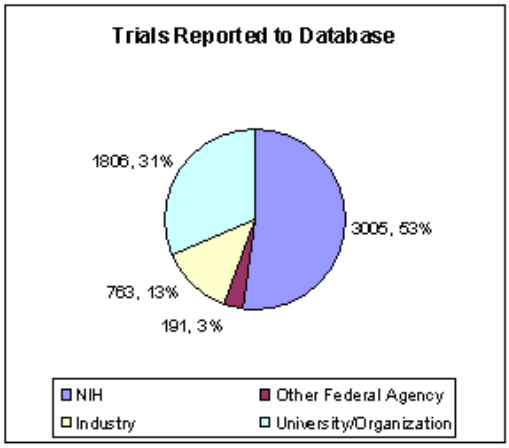
However, according to the report, OECA has not been able to provide "useful and reliable information necessary to effectively implement, manage, evaluate, and continuously improve program results." In 2000, OECA began

to pursue voluntary "global" settlements with petroleum refinery companies. This method allowed companies to avoid investigation and litigation by entering into a consent decree in which the company would work with the OECA to reduce emissions. However, as reported in the IG analysis, OECA is not sufficiently monitoring the companies' performance and improvement. Furthermore, EPA was slow to respond to consent decree documents submitted by companies, and the resulting delays have pushed back implementation of emission reduction projects.

EPA is required to release a response to the report within 90 days. In comments on the draft of the report, EPA said it believes that the IG report downplayed the complexity of refinery regulation and was unbalanced in its criticism of OECA, though EPA did agree that some of the recommendations should be implemented.

FDA Ignores Law on Drug Trial Information

Concerned that they do not fully understand the safety of many pharmaceuticals, patient advocacy groups and the American Medical Association have recently called for drug manufacturers to disclose clinical trials to a government database. What many of these professionals did not know was that the release of such information was already mandated by a little-enforced 1997 law, the FDA Modernization Act of 1997. According to the *Washington Post*, the FDA acknowledges that it has not enforced the law, arguing that the statute did not explicitly give the agency enforcement authority. One sign of the incompleteness of the database (which can be found online at ClinicalTrials.gov) is that only 13 percent of the registered trials on the website were reported by the pharmaceutical industry, even though over 80 percent of trials are funded by for-profit companies.



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